TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1915

No. [redacted] 3[redacted] 86

THE UNITED STATES, APPELLANT,

vs.

LOUIS HEMMER, WILLIAM W. FLETCHER, J. E. PEART, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED MARCH 10, 1914.

(24093)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 942.

THE UNITED STATES, APPELLANT,

vs.

LOUIS HEMMER, WILLIAM W. FLETCHER, J. E. PEART, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December term, 1912, of said court, before the honorable Walter H. Sanborn, circuit judge, and the honorable William H. Munger and the honorable Jacob Trieber, district judges.

Attest:
[SEAL.]

JOHN D. JORDAN,
Clerk of the United States Circuit
Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the sixteenth day of September, A. D. 1912, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of South Dakota was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein Louis Hemmer et al. are appellants and The United States of America is appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, is in the words and figures following, to wit:

1 Citation.

In the United States Circuit Court of Appeals, Eighth Circuit.

The United States of America, Complainants,

vs.

Louis Hemmer, William W. Fletcher, J. E. Peart, Richard Trust Company, Iowa and Dakota Land Company, Fred D. Henderson, as Treasurer of Moody County, South Dakota, E. A. Hornby, as Auditor of Moody County, South Dakota, Job Robinson, S. W. Ballard and L. W. Ballard, co-partners as Ballard & Son and Moody County, South Dakota, Defendants.

The President of the United States: To the United States of America, and Edward E. Wagner, U. S. District Attorney for the District of South Dakota—Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an order allowing an appeal entered in the clerk's office of the District Court of the United States for the District of South Dakota, wherein the United States of America is the complainant and respondent, and Louis Hemmer, William W. Fletcher, J. E. Peart and Moody County, South Dakota, are defendants and appellants, to show cause, if any there be, why the decree rendered against the said defendants and appellants, as in the said order allowing an appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James D. Elliott, Judge of the District Court of the United States for the District of South Dakota, this 17th day of July, A. D., 1912.

JAMES D. ELLIOTT,
District Judge.

2 Due timely and personal service of the above and foregoing citation is hereby admitted, this 18 day of July, A. D., 1912.

EDWARD E. WAGNER,
U. S. District Attorney, District of South Dakota.

3 Filed in the District Court on July 19, 1912.

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4 In the District Court of the United States of America, in and for the Southern Division of the District of South Dakota.

The United States of America, Complainant,
No. 573. vs. In Equity.
Louis Hemmer, William W. Fletcher, J. E. Peart, Richards Trust Company, Iowa and Dakota Land Company, Fred D. Henderson, as Treasurer of Moody County, South Dakota, E. A. Hornby, as Auditor of Moody County, South Dakota, Job Robinson, S. W. Ballard and L. W. Ballard, co-partners as Ballard & Son and Moody County, South Dakota, Defendants.

Be It Remembered, That on the 28th day of July, A. D. 1909, there was filed in the Circuit Court of the United States for the District of South Dakota, which has since been succeeded by the District Court of the United States for the District of South Dakota, on behalf of the complainant, a Bill in Equity; which said Bill in Equity is in words and figures the following, to-wit:

Complaint.

In the Circuit Court of the United States, Eighth Judicial Circuit, District of South Dakota, Southern Division.

The United States of America, Complainants,
vs.
Louis Hemmer, William W. Fletcher, J. E. Peart, Richards Trust Company, Iowa and Dakota Land Company, Fred D. Henderson, as Treasurer of Moody County, South Dakota, E. A. Hornby, as Auditor of Moody County, South Dakota, Job Robinson, S. W. Ballard and L. W. Ballard, co-partners as Ballard & Son and Moody County, South Dakota, Defendants.

To the Honorables, the Judges of the Circuit Court
5 of the United States, in and for the District of South Dakota:

The United States of America, by Edward E. Wagner, United States Attorney for said District, brings this its Bill of Complaint against the defendants, Louis Hemmer, William W. Fletcher, J. E. Peart, Job Robinson, Fred D. Henderson, E. A. Hornby, Job Robinson, citizens and residents of Moody County, So., Dak., S. W. Ballard and L. W. Ballard, citizens and residents of Minnehaha County, South Dakota, Richards Trust Company, a corporation existing under the laws of South Dakota, and having its principal place of business in the city of Huron, County of Beadle, State of South Dakota,

and the Iowa & Dakota Land Company, a corporation organized and existing under the laws of the State of South Dakota or of the State of Iowa, and Moody County, a duly organized County of the State of South Dakota, under and in pursuance of instructions of the Attorney General of the United States.

1.

And thereupon your orator alleges and complains that one Henry H. Taylor, sometimes known and designated Henry Taylor, is and during all of the times hereinafter mentioned was a Sioux Indian of the full blood, belonging to and a member of the Santee Sioux Band of Indians, and that on or about October 7th, 1878, in pursuance of authority conferred by an Act of Congress, approved March 3rd, 1875, Chapter 131 (18 Stat. at Large 420) he made application to enter and entered the following described real property, situated in the County of Moody, State of South Dakota (then territory of Dakota) to-wit: The west half (W½) of the Southwest quarter (SW¼) of Section twenty-two (22) and the
6 East half (E½) of the Southeast quarter (SE¼) of Section twenty-one (21) in Township One hundred six (106), North, Range Forty-nine (49) West of the Fifth (5) Principal Meridian, under an Act of Congress entitled "An Act to secure Homesteads to Actual Settlers on the Public Domain" approved May 20th, 1862 and Acts amendatory thereof, by making satisfactory proof under the rules prescribed by the Secretary of the Interior to the offices of the United States, in charge of the United States Land Office, then located at Sioux Falls, Dakota, that he, the said Henry H. Taylor, was an Indian born in the United States, was the head of a family and at such time had arrived at the age of twenty-one years, had [abandon--] his tribal relations as such Indian.

That at the time he entered said land as aforesaid, he was the head of a family, and at that time had arrived at the age of twenty-one years and had abandon his tribal relations and was an Indian born in the United States.

That the application and affidavits filed by said Taylor in the said United States Land Office and subsequently filed in the General Land Office of the United States, contained among other things the following: "That I am an Indian, formerly of the Santee Sioux Tribe; that I have abandon my tribal relations with that Tribe and adopt the habits of civilized life."

That said application was designated as an Indian Homestead Application and the receiver's receipt, issued by the re-

ceiver of said Land Office for the fees, received by him
7 for said entry, which has remained on file as part of the files and records in the General Land Office of the United States, was endorsed and designated "Indian Homestead", as well as the final certificate issued by the receiver of the United States Land Office at Mitchell, Dakota Territory, dated December 11th, 1884.

That said Taylor resided upon and occupied the above described land as his homestead in the manner aforesaid, and prior to December 11th, 1884, made satisfactory proof to the officers of the United States in charge of the Land Office at Mitchell, as well as to the General Land Office at Washington, of his occupancy of and residence upon said land for a period of five years, prior to said last mentioned date, in pursuance of his homestead entry thereon and made full payment for said land and received his final receiver's certificate as aforesaid, December 11th, 1884, wherein it was designated that the patent to be issued to said Taylor for said homestead entry was and should be subject to all of the restraints and restrictions upon alienation of said land as provided by said Act of March 3rd, 1875, as well as the Act of Congress, approved July 4th, 1884, Chapter 180 (23 Stat. at Large 96).

That said Taylor resided and continued to reside upon said land with his family as the head of a family and to occupy the same as his homestead until about April 28th, 1909, when he and his family were forcibly removed therefrom by the defendant Louis Hemmer, who removed or caused said Taylor and his family to be removed from the said premises by force and violence, and who has by such means wrongfully deprived said Taylor of the possession of said premises at all times since.

II.

Your orator further shows unto your Honors that while
8 said Henry H. Taylor with his family resided upon and occupied said real property in the manner aforesaid and about August 8th, 1908, he and his wife Anna Taylor entered into an agreement or contract for deed with the defendant, J. E. Peart, whereby said Taylor and his said wife agreed to sell and convey said real property above described to the defendant Peart for a valuable consideration. That said contract for deed was filed for record and recorded in the office of the Register of Deeds within and for said County of Moody, State of South Dakota, August 29th, 1908, at five o'clock P. M. in Book 24 at page 606, of the records of said office and thereafter on or about September 8th, 1908, the defendant Peart assigned said contract to the defendant, William W. Fletcher, which as-

signment was in writing, and was filed for record September 11th, 1908, at ten o'clock A. M., in the office of the Register of Deeds in Book 24, at page 608 thereof.

That thereafter about November 21st, 1908, said Taylor and his wife having refused to sell and convey said real property to said Fletcher, in accordance with said contract, said defendant Fletcher caused a suit to be instituted in this Court against said Taylor and his wife, Anna Taylor, to compel the specific performance of the said contract to convey said real property by said Taylor and his wife and on the 30th day of December, 1908, the decree of this Court was entered in said suit, of which the following is a true copy:

"In the Circuit Court of the United States, Within and for the Southern Division of the District of South Dakota.

William W. Fletcher, Complainant,
vs.
Henry Taylor and Anna Taylor, Defendant.

October Term,

Sioux Falls.

This cause came on to be heard at this term and was submitted upon the bill, answer and upon written briefs, furn-
9 ished by counsel and thereupon upon consideration thereof, it is Ordered adjudged and decreed, as follows: That, that certain contract made and entered into by one J. E. Peart and Henry Taylor and Anna Taylor, dated the 8th day of August, 1908, and filed for record in the office of the Register of Deeds of Moody County, South Dakota, on the 29th day of August, A. D. 1908 and recorded in book 24 of Deeds on page 606 which said contract was subsequently assigned by said J. E. Peart to William W. Fletcher by an instrument in writing, filed for record in the office of the Register of Deeds of Moody County, South Dakota, on the 11th day of September, A. D. 1908, and recorded in Book 24 of Deeds on page 208, be specifically performed and that said Henry Taylor and Anna Taylor [made,] execute and deliver to the said William W. Fletcher a good and sufficient deed of conveyance to the premises in said contract described, to-wit:

The East half (E½) of the southeast ¼ of Section Twenty-one (21) and the West ½ Southwest ¼ Section Twenty-two (22), all in Township 106, Range Forty-nine, Moody County, South Dakota, upon said William W. Fletcher paying to the said Henry Taylor and Anna Taylor the consideration in said contract mentioned, to-wit: The sum of Twenty-four hundred Dollars ($2400.00) and that if the said Henry Taylor and Anna

Taylor, the said defendants, refuses to so execute and deliver to said William W. Fletcher the deed conveying said premises aforesaid, within thirty days from the entering of this Decree then F. A. Spafford of Flandreau, S. D., be and he is hereby appointed Master [of] Execute and deliver to the said William W. Fletcher a deed of conveyance to said premises and that such deed shall in all respects be of the same force and effect as if made, executed and delivered by the said Henry Taylor and Anna Taylor.

10 It is further ordered that the complainant recover from the defendant his costs and disbursements in this action to be hereafter taxed according to the rules of the Court in the sum of ..... Dollars and interest herein.

Dated this 30th day of December, A. D. 1908."

By the Court:

(Seal of Court) (Signed) JOHN E. CARLAND, Judge.

Attest: (Signed) Oliver S. Pendar, Clerk.

Endorsed: "In the Circuit Court of the United States in and for Southern Division of the District of South Dakota, William W. Fletcher, vs. Henry Taylor and Anna Taylor, Final Decree—Rice & Benson, Att'ys. for Complainant, Flandreau, S. Dak. Filed Dec. 30th, 1908, Oliver S. Pendar, Clk. By Odin R. Davis, Deputy.

United States of America,
District of South Dakota—ss.

I, Oliver S. Pendar, Clerk of the Circuit Court of the United States of America for the District of South Dakota, do hereby certify that I have carefully compared the foregoing copy of the original thereof, which is in my custody as such clerk and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Sioux Falls in said District this 6th day of Jany. A. D. 1909.

(Court Seal) (Signed) OLIVER S. PENDAR, Clerk.
By Odin R. Davis, Deputy".

That thereafter in pursuance of said decree a deed was executed by F. A. Spafford to the defendant Fletcher, pur-
11 porting to convey the said real property to said Fletcher and on the 5th day of February, 1909, or thereabouts the defendant Fletcher executed and delivered to the defendant Louis Hemmer, a warranty deed, purporting to con-

vey said property to said Hemmer, both of which deeds were recorded in the office of the Register of Deeds in and for the County of Moody, State of South Dakota; the deed to Fletcher having been recorded February 10th, 1909, in Book 29 at page 28, and the deed from Fletcher to Hemmer, having been recorded February 8th, 1909, at eight o'clock A. M., in Book 30 at page 6 thereof.

And your orator believes and therefore alleges that said defendant Hemmer claims some estate in or right to the possession of the said real property by virtue of said deed from Fletcher to him and that he deprives said Taylor of the possession of said land by virtue thereof.

III.

Your orator further shows unto your Honors that although he entered said land as a homestead, under and pursuant to the Act of March 3rd, 1875 (Supra) that he made his final proof and payment for said land under the requirements promulgated by the Secretary of the Interior, subsequent to July 4th, 1884, and that he was entitled to receive from your orator, or its duly authorized officers and agents, a patent for said land in accordance with the provisions of said Act of July 4th, 1884, (Supra) subject to the following provisions:

"All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for a period of twenty-five years, in trust for the sole
12 use and benefit of the Indian, by whom such entry shall have been made, or, in case of his decease, to his widow or heirs, according to the laws of the state or territory where such land is located, and that at the expiration of such period the United States will convey the same by patent to such Indian, or his widow or heirs, as aforesaid, in fee, discharged of such trust and free of all charge and encumbrances whatsoever."

Your orator further alleges that although he was entitled to a patent under said Act of Congress containing the provision aforesaid, there was issued to him by mistake a patent purporting to have been issued under the Act of Congress, approved June 18th, 1881 (21 Stat. at Large 715) the patent containing the following provision:

"This patent is issued upon the express condition that the title hereby conveyed shall not be subject to alienation or encumbrance, whether by voluntary conveyance or by judgment, or the decree of any Court, or subject to taxation, of any character, and shall remain inalienable and not subject to taxation

for a period of twenty years from the date thereof, as provided by the Act of Congress, approved June 18th, 1881."

Your orator further says that such patent was issued without authority of law and by mistake as aforesaid and that said Act of Congress, approved June 18th, 1881, was enacted for the sole use and benefit of the Winnebago Indians of Nebraska and Wisconsin; and that the said Taylor was not a Winnebago Indian of Nebraska or Wisconsin, but was a Santee Indian of the Sioux Tribe, as aforesaid, and was not entitled to the provisions of said Act of Congress of June 18th, 1881. But when said patent was issued as aforesaid, he was entitled to receive from your orator a patent to the effect that your orator will hold said land for the use and benefit of the said Taylor, or his widow and heirs, in trust for a period of twenty-five
13 years and not otherwise. And that although said Taylor was entitled to such patent from your orator, your orator avers that none was issued to him until the 10th day of June, A. D. 1909, on which date the President of the United States caused to be issued to the said Taylor a patent, as follows:

"53845-09
33254-09 I. O."

"The United States of America: To all to whom these presents come,—Greeting:

Certificate No. 5414

Application 10666.

Whereas, There has been deposited in the General Land Office of the United States a certificate of the Register of the Land Office at Mitchell, Dakota, whereby it appears that pursuant to the provisions of the Revised Statutes of the United States, Chapter five, Title thirty-two, in relation to Homesteads on the Public Lands, and supplemental Statutes, and the Act of Congress of July 4, 1884, entitled "An Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian Tribes for the year ending June thirtieth, eighteen hundred and eighty-five and for other purposes," the claim of Henry Taylor has been established and duly [concummated] in conformity to law for the west half of the southwest quarter of Section twenty-two and the east half of the southeast quarter of Section twenty-one in Township one hundred six north of Range forty-nine of the Fifth Principal Meridian,

South Dakota, containing one hundred sixty acres, ac-
14 cording to the Official Plat of the Survey of the said land returned to the General Land Office by the Surveyor General.

Now Know Ye, That the United States of America, in consideration of the premises, and in accordance with the provisions of the said Act of Congress of July 4, 1884, hereby declares that it does and will hold the land above described for the period of twenty-five years in trust for the sole use and benefit of the said Henry Taylor, or in case of his decease of his widow and heirs, according to the laws of the State where such land is located, and at the expiration of said period the United States will convey the same by patent to the said Henry Taylor, or his widow and heirs as aforesaid in fee, discharged of said trust and free of all charge or incumbrance whatsoever; subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted as provided by law.

This patent is issued in lieu of one containing twenty year trust clause dated June 6th, 1890, which has been cancelled.

In Testimony Whereof, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the tenth day of June, in the year of our Lord one thousand nine hundred nine and of the Independence of the United
15 States the one hundred and thirty-third."

"By the President

(Seal)
Patent Number
66400

(signed) WM. H. TAFT,
By (Signed) M. U. Young,
Secretary.

(Signed) H. W.....
Recorded General Land Office."

IV.

Your orator further shows unto your honors that at all times since the homestead entry of the said Taylor upon the land above described, your orator has held said land in trust

for the sole use and benefit of the said Taylor and that it now holds the same for him in trust for his sole use and benefit and that the obligation resting upon your orator by virtue of said Act of June 4th, 1884, to convey the same by patent to him, or his widow and heirs, in fee, discharged of said trust and free of all incumbrances whatsoever, for twenty-five years after the date of the last mentioned patent, to-wit: June 10th, 1909.

That when the said Taylor and wife entered into the contract for deed or the instrument purporting to be such with the defendant Peart, said land was held by your orator in trust as aforesaid, and that said Taylor and his wife had no authority to make such contract and that neither of them have at any time been authorized to or possessed legal authority or power to contract for the delivery of a deed, or the conveyance of the said land, or to alienate the same in any manner whatsoever, and that none of the said defendants, Peart, Fletcher or Hemmer could lawfully acquire any right, title or interest whatsoever, in said real property, by virtue of the assignment of said contract, purporting to convey said
16 land, nor by the decree of the Court hereinbefore set out. That neither the secretary of the Interior or any other officer of your orator have ever approved or ratified any sale or conveyance thereof.

V.

Your orator further shows to your honors that notwithstanding said land has been held in trust by your orator for the use and benefit of the said Taylors, that the defendant Henderson, as Treasurer of said Moody County, South Dakota, and E. A. Hornby, as Auditor of said County, in their official capacity, as well as the said County of Moody have attempted to cause said land to be assessed for taxes, and have levied and caused to be levied taxes against the same, and said Treasurer and Auditor have listed said property for sale for the non-payment of the taxes so assessed and levied, and said County, as well as said officers do now threaten to levy and collect taxes thereon by sale of said property, notwithstanding the title thereof is held by your orator as aforesaid, and that said land has at all times been and is exempt from taxation.

VI.

Your orator further shows that the defendant Job Robinson claims some interest or estate in the said land by virtue of a certain Treasurer's Deed, issued by the Treasurer of the said County of Moody to one Fred L. Rice, who has conveyed or attempted to convey and thereby claims to have ac-

quired by virtue of said Treasurer's deed to said Job Robinson.

Your orator further shows that the said defendant, Iowa & Dakota Land Company and the defendant, Richards Trust Company, each claim some estate in or right to said
17 land by virtue of Treasurer's deeds, heretofore executed by the treasurer of said Moody County.

That the deed by which said Job Robinson claims an estate in said property was recorded in the office of the Register of Deeds of said County of Moody, October 13th, 1890, at two o'clock P. M. in Book 11 at page 299 thereof; that the Defendant Iowa & Dakota Land Company claims an estate in said land by virtue of a certain quit claim deed from A. M. Bowdle and wife, filed for [recorded] and recorded in the office of the Register of Deeds, September 1st, 1893, in Book 10, at page 456 thereof; that the defendant Richards Trust Company claims an estate in said land by virtue of a deed from R. O. Richards and wife, which was filed for record and recorded in the office of the Register of Deeds in and for said County of Moody, November 14th, 1902, in Book 17, at page 176 thereof, and your orator further says that each and all of the said deeds, and the decree of the Court entered as aforesaid are each of them a cloud upon the title to the said land, and that each and all of the said defendants claim some right, interest or estate therein by virtue thereof.

VII.

Your orator further alleges that on the 19th day of May 1909, there was filed and docketed in the office of the Clerk of the Circuit Court within and for Moody County, South Dakota, a judgment in favor of the defendants, S. W. Ballard and L. W. Ballard, co-partners as Ballard & Son, amounting to One Hundred Ninety-eight Dollars and Eighty-five Cents ($198.85) by virtue of which said Ballard & Son claim a lien upon the said real property, which is also a cloud upon the title thereof.

18 Your orator further says that this suit in equity is brought against each and all of the said defendants for the purpose of removing the clouds from said title and cancelling each and all of the said instruments to avoid a multiplicity of suits and actions at law for the purpose of protecting said land for the use and benefit of the said Taylor and in the execution and discharge of the trust reposed in your orator by the laws of the United States.

That your orator cannot have adequate relief except in this Court, and to the end therefore that the defendants may,

if they can, show why your orator should not have the relief prayed, and make full disclosure and discovery of the matters aforesaid according to the best and utmost of their knowledge, information and belief, full, true, correct proof and answers make of the matters hereinbefore stated and charged, but not under oath, answers by oath being hereby expressly waived.

And your orator further prays that each and all of the instruments hereinbefore mentioned, as well as the decree of this Court above set out, be cancelled, vacated and set aside and held for naught; that the judgment of the defendants, Ballard and Son, be adjudged to be no lien against the said real property, and that each and all of the defendants be decreed to have no estate, right, title or interest in the said real property, and that each and all of them be enjoined and forever estopped from claiming any estate, right, title or interest therein, and that the defendant, Moody County, as well as the treasurer and auditor thereof, and all of its of-
19 ficers be enjoined from levying, assessing or collecting taxes on or against the said real property, and that the same be decreed not subject to taxation by said County, or any of its officers, and for such other and further relief as equity may require and to your orators may seem meet.

May it please your honors to grant unto your orator not only a writ [—] injunction conformable to the prayer of this Bill of Complaint, against the said County of Moody, its treasurer, auditor and other officers, restraining and enjoining them from assessing, levying and collecting taxes against said land, but also the right to a subpoena from the United States of America, directed to each of the defendants, commanding them on a day certain to appear and answer unto this Bill of Complaint and abide such order and decree, in the premises, as the Court shall deem proper and required by the [principals] of equity and good conscience.

EDWARD E. WAGNER,
Solicitor for Complainants.

State of South Dakota,
County of Hanson—ss.

On this 26th day of July, A. D. 1909, before me personally appeared Edward E. Wagner, United States Attorney for [for] the District of South Dakota, and being duly sworn, deposes and says, that he is the Solicitor for the Complainants herein; duly authorized to institute such suit; that he is familiar with the transactions set forth in said Bill of Complaint; knows the contents thereof and that the same is true to the best of his knowledge, information and belief. Such informa-

tion and belief is based upon the abstract of the title to said real property, as well as letters and documents from the Department of the Interior, setting forth all of the said
20 facts in detail, as well as from a personal interview with the said Henry H. Taylor, mentioned in said Complaint.

EDWARD E. WAGNER,

Subscribed and sworn to before me this 27th day of July, A. D. 1909.

(Notarial Seal) W. E. VAN DEMARK,
Notary Public, South Dakota.

Endorsed: Filed in the Circuit Court on July 28, 1909.

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21 (Answer of F. D. Henderson, as Treasurer, and E. A. Hornby, as Auditor, of Moody County, S. D., and Moody County, S. D.)

The joint and several answers of Fred D. Henderson, as Treasurer of Moody County, South Dakota, E. A. Hornby, as Auditor of Moody County, South Dakota, to the bill of complaint of the United States of America, complainants. These defendants now and at all times hereafter saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised, it is material or necessary for them to make answer to, severally answering say:

I.

That Henry H. Taylor, sometimes known as Henry Taylor, then and there being an Indian, born in the United States of America, having arrived at the age of 21 years, and having also abandoned his tribal relations as Such Indian and having made proofs satisfactory to the Secretary of the Interior of all the facts above stated, did on the 7th day of Octo-
22 ber, A. D. 1878, under the name of Henry Taylor, make homestead entry upon the following described premises, to-wit: The West Half of the South East Quarter (W½ SE¼) of Section Twenty-one (21), and the East half of the Southwest quarter (E½ SW¼) of Section Twenty-two (22) all in Township One Hundred Six (106) North of Range Forty Nine (49) West of the Fifth Principal Meridian, and that the said Henry H. Taylor, having made homestead entry as aforesaid, did immediately thereupon establish his residence upon said premises above described, and did continuously thereafter live and reside upon said premises for the period of five years,

and during said time, he, the said Henry H. Taylor, in all respects, did comply with the rules and regulations of the Homestead Act and Acts amendatory thereto, and that by reason of the premises aforesaid, he, the said Henry H. Taylor, on the 8th day of October, A. D. 1883, was entitled to a patent from the United States, granting to him, in fee, the premises above described, pursuant to act of Congress of March 3, 1875, subject only to the restrictions contained in said act as follows, to-wit: "Provided however, that the title to said lands acquired by any Indian by virtue hereof, shall not be subject to alienation or incumbrance, either by involuntary conveyance or the judgment or order of [an-] Court, and shall be, and remain inalienable for a period of five years from the date of the patent issued thereto."

That prior to the 11th day of December, A. D. 1884, the said Henry H. Taylor made satisfactory proof to the officers of the United States in charge of the Land Office at Mitchell,
23 South Dakota, as well as to the General Land Office at Washington, D. C. as to occupancy of and residence upon the said described premises in pursuance of his homestead entry thereon, and made full payment for said land, and on the said 11th day of December A. D. 1884, received his final receipt from the proper officer of the Land Office.

That by reason of all the premises aforesaid, the said Henry H. Taylor was then and there entitled to a patent from the United States, conveying to him in fee, the premises above described, subject only to the restrictions and limitations contained in the 15th section of the Act of Congress of March 3, 1875, in regard to alienation and incumbrance, such restrictions being heretofore set forth herein.

II.

That although the said Henry H. Taylor entered said premises as a homestead, under and pursuant to the Act of Congress of March, 3, 1875, and completed his residence of five years upon said premises and in all respects earned his patent from the United States Government, long prior to July 4, 1884, and although the said Henry H. Taylor was entitled to receive from the United States Government a patent, pursuant to the said Act of Congress of March 3, 1875, subject only to the provisions hereinbefore set forth, limiting the time of alienation and encumbrance to five years from the issuance of the patent, the United States Government issued to him a patent purporting to be issued under Act of Congress of June 1881, the said patent being in words and figures as follows:

24 The United States of America: To all to whom these presents shall come,—Greeting:

Homestead Certificate No. 5414)
Application 10666)

Whereas, There has been deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Mitchell, Dakota Territory, whereby it appears that pursuant to the Act of Congress approved 20th May 1862.

"To secure homesteads to actual settlers on the Public Domain and the Act supplemental thereto the claims of Henry Taylor has been established and duly [consum-ated] in conformity to law, for the West half of the South West quarter of Section twenty two and the east half of the Southeast quarter of Section twenty one, in township one hundred and six, north of range forty nine, west of the fifth Principal Meridian in Dakota Territory, containing One hundred and sixty acres according to the Official Plat of the survey of the said lands returned to the General Land Office by the Surveyor General.

Now know ye; That there is therefore granted by the United States unto the said Henry Taylor the tracts of land above described; To have and to hold the said tract of land with the appurtenances thereof unto the said Henry Taylor and to his heirs and assigns forever. Subject to any vested and accrued water rights for mining, agriculture, manufacturing, or other purposes and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by local customs, laws and decisions of courts and also subject to the right of the proprietor of a vein
25 or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted as provided by law.

This patent is issued upon the express condition that the title hereby conveyed shall not be subject to alienation or incumbrance either by voluntary conveyance or by judgment, decree or order of any Court, or subject to taxation of any character, but shall remain inalienable and not subject to taxation for the period of twenty years from the date hereof, as provided by Act of Congress approved January 18, 1891.

In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made, patent and seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the sixth day of June in the year of our Lord One Thousand Eight Hundred and Ninety, and of the Independence of the United States the One Hundred and fourteenth.

(United States)

By the President, Benjamin Harrison.
By M. McKean, Secretary.
Res. Vol. 9, Pages 313 to 314.
I. R. Convell, Recorder of the General Land Office.

Ad. interim"

That by the said patent, the United States fully and effectually granted to the said Henry H. Taylor the premises above described, but that by mistake, the officers issuing said patent, inserted therein the restriction clause applicable to the Winnebago Indians, and limiting the period of alienation and incumbrance to twenty years, from the date of said
26 patent, whereas the only restriction which properly should have been inserted in said patent was that contained in the Act of March 3, 1875, limiting the period of limitation and incumbrance to five years after the date of such patent.

III.

That on the 10th day of June, A. D. 1909, a purported patent was issued by the United States to the said Henry H. Taylor for the premises above described, containing the following provision: "Now know ye that the United States of America in consideration of the premises and in accordance with the provisions of the Act of Congress of July 4th, 1884, hereby declares that he does, and will, hold the land above described for the period of twenty-five years, in trust for the sole use and benefit of the said Henry H. Taylor, or in case of his decease [-or] his widow and heirs according to the laws of the State where such land is located, and at the expiration of said period, the United States will convey the same to the said Henry H. Taylor or his widow or heirs as aforesaid, discharged of said trust and free from all incumbrance whatsoever".

That as the said Henry H. Taylor, at the time of making his entry upon said premises, in all respects complied with the Act of March 3, 1875, as to citizenship and proof thereof, and as he had completed his residence upon said premises and earned a patent thereto under said act long prior to the enactment of the Act of July 4th, 1884, and as by Treaties
27 of the United States with the tribe of Indians to which the said Henry H. Taylor belonged, full citizenship

had been conferred upon him, and as the United States had previously granted said premises to the said Henry H. Taylor, the said patent was issued without any authority of law and is null and void.

IV.

That by treaties of the United States Government entered into with the tribe of Indians of which the said Henry H. Taylor was a member, full citizenship was conferred by the United States Government upon the said Henry H. Taylor, and he was thereby granted all the rights, privileges and immunities of other citizens of the United States.

V.

That by reason of the facts aforesaid the said land has been rightfully subject to taxation since the unrestricted title vested in the said Henry H. Taylor.

Wherefore The Defendants, Fred D. Henderson, as Treasurer of Moody County, South Dakota, E. A. Hornby, as Auditor of Moody County, South Dakota, and Moody County, South Dakota, ask a Decree of this Court dismissing [Complainants] bill of complaint herein, and, that the said Defendants may recover their reasonable costs and disbursements, and they ask for such other and further relief as may seem just and equitable in the premises.

IRA F. BLEWITT,
Solicitor for the Defendants, Fred D. Henderson,
E. A. Hornby, and Moody County, South Dakota.

28 State of South Dakota,
County of Moody—ss.

Fred D. Henderson, as Treasurer of Moody County, South Dakota, E. A. Hornby, as Auditor of Moody County, South Dakota, and Ira F. Blewitt, as States Attorney of Moody County, and for [an-] on behalf of Moody County, South Dakota, make solemn oath and says: I am the above named defendant, so much of the foregoing Answer as concerns my own acts, and deeds, is true to the best of my own knowledge, and so much thereof as concerns the acts or deeds of any other person or persons, I believe to be true.

F. D. HENDERSON,
EDGAR A. HORNBY,
IRA F. BLEWITT.

Subscribed and sworn to before me this 25th day of January, 1910.

(Seal of Court) W. H. KELLOGG,
Clerk of the Circuit Court, Moody County, South Dakota

Endorsed: Filed in the Circuit Court on Jan. 27, 1910.

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30 (Replication.)

The replication of the above named complainant to the answers of the above named defendants, and each of them:

This replicant, saving and reserving all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answers of the said defendants, for replication thereunto sayeth that it does and will ever maintain and prove its said bill to be true, certain, and sufficient in the law to be answered unto by said defendants, and that the answers of said defendants are very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in said answers contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all matters and things this replicant is ready to aver, maintain, and prove as this
31 Honorable Court shall direct, and humbly as in and by its said bill it has already prayed.

EDWARD E. WAGNER,
Solicitor for Plaintiff.

Endorsed: Filed in the Circuit Court on July 21, 1910.

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32 Agreed Statement of Facts. Filed in the District Court on Feb. 8, 1912.

The following statement of facts is hereby agreed upon as a correct statement of the facts in said case and upon which the same may be submitted to the Court in connection with the pleadings filed herein:

1st.

That Henry H. Taylor is a fullblood Sioux Indian and a member of the Santee Sioux Band of Indians, and is not now a member of the Winnebago Band of Indians, and never had any connection with said Winnebago Band of Indians.

2nd.

That on the 7th day of October, 1878, said Henry H. Taylor, under the name of Henry Taylor, made homestead application #10666 at the United States Land Office at Sioux Falls, Dakota Territory, to enter, and did enter as a homestead the following described real property, situate in Moody County, then Territory of Dakota, now State of South Dakota, to-wit: The West Half of the Southwest Quarter of Section twenty-two (22), and the East Half of the Southeast Quarter of Section twenty-one (21) in Township one hundred and six (106) North, of Range forty-nine (49) West of the Fifth Principal
33 Meridian, containing 160 acres of land according to the United States government survey thereof, said land being then a part of the public domain and subject to entry under the homestead laws of the United States, then in force.

3rd.

That said Taylor was at said time an Indian born in the United States, was the head of a family and was over the age of twenty-one years, and had abandoned his tribal relations as such Indian.

4th.

That immediately after making such homestead entry said Taylor entered upon said land and established a residence thereon and resided thereon for a period of five years and made satisfactory proof of all of the aforesaid facts to the Commissioner of the General Land Office.

That the bundle of papers hereto annexed marked Exhibit A, consisting of homestead application, affidavits, receipts, final proof, affidavit of publicaton, and non-mineral affidavit, are true copies of the original papers filed in connection with said homestead entry and are hereby made a part of this agreed statement of facts.

5th.

That the photographic copy of the letter attached to Exhibit A from the Acting Commissioner of Indian Affairs to the Secretary of the Interior, marked "Received May 14, 1909" is also made a part of this agreed statement of facts, to be considered in lieu of the original thereof subject to the following objection on the part of the defendants.

The defendants object to the letter for the reason that the same is immaterial and incompetent, and not binding upon the defendant or the patentee, and that the matter was not
34 then pending before the Department of the Interior or the Commissioner of the General Land Office.

6th.

That on the 6th day of June, A. D. 1890, a patent for said land was issued to the said Henry Taylor, of which the following, marked Exhibit B, is a true copy:

The United States of America, to all to whom these presents shall come,—Greeting:

Homestead Certificate No. 5414

Application 10666.

Whereas, There has been deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Mitchell, Dakota Territory, whereby it appears that pursuant to the Act of Congress approved 20th May, 1862.

"To secure homesteads to actual settlers on the Public Domain and the Act supplemental thereto the claims of Henry Taylor has been established and duly consummated in conformity to law, for the West half of the Southwest Quarter of Section twenty-two and the East half of the Southeast Quarter of Section twenty-one, in Township one hundred and six, North of Range forty-nine West, of the Fifth Principal Meridian, in Dakota Territory, containing One Hundred and Sixty acres, according to the Official Plat of the survey of the said lands returned to the General Land Office by the Surveyor General.

Now know ye, that there is therefore granted by the United States unto the said Henry Taylor the tracts of land above described: To have and to hold the said tract of land with the appurtenances thereof unto the said Henry Taylor and
35 to his heirs and assigns forever. Subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted as provided by law.

This patent is issued upon the express condition that the title hereby conveyed shall not be subject to alienation or incumbrance either by voluntary conveyance or by judgment, decree or order of any Court, or subject to taxation of any character, but shall remain inalienable and not subject to taxation for the period of twenty years from the date hereof, as provided by Act of Congress approved January 18, 1891.

In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent and seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington the sixth day of June, in the year of our Lord One Thousand Eight Hundred and Ninety, and of the Independence of the United States and the One Hundred and Fourteenth.

(UNITED STATES)

By the President, Benjamin Harrison,
By M. McKean, Secretary.

Res. Vol. 9, Pages 313 to 314.

I. R. Convell, [Recorded] of the General Land Office,

Ad interim."

36 That said patent was recorded in the office of the Register of Deeds for Moody County, South Dakota, August 13, 1908, in Book 20 at page 463 thereof.

7th.

That said Taylor continued to own and occupy said land with his family and on the 8th day of August, A. D. 1908, he and his wife made a contract with one, J. E. Peart, of which the following, marked Exhibit C, is a true copy:

"This Agreement, Made and entered into this 8th day of August, A. D. 1908, by and between Henry Taylor and his wife Anna Taylor, parties of the first part, and J. E. Peart, party of the second part;

Witnesseth, That if the party of the second part, shall first make the payments and perform the covenants hereinafter mentioned on his part to be made and performed, the said parties of the first part hereby covenant and agree to convey and assure to the said party of the second part, in fee simple, clear of all incumbrances whatsoever, by a good and sufficient Warranty Deed and clear abstract, the lots, piece or parcel of ground, situate in the County of Moody, and State of South Dakota, known and described as follows: The West half of the South West Quarter (W½SW¼) of Section twenty-two (22) and the East half of the South East Quarter (E½-SE¼) of Section twenty-one (21), Township One Hundred Six (106) North of Range Forty-nine (49), West of the 5th P. M. in Moody County, State of South Dakota. And
37 the said party of the second part, hereby covenants and agrees to pay to said party of the first part the sum

of Twenty-four Hundred Dollars, in the manner following, payable at the office of Jordan & Warren, at Flandreau, South Dakota: Parties of the first part shall accept Lot 1 of the N. W. 1/4 of Sec. 21-107-48 Moody County, South Dakota, at a consideration of $550.00 as payment of the within described land.

The party of the second part shall keep out the sum of $800.00 of the purchase price until the S. E. 1/4 of the S. E. 1/4 of Sec. 21-106-49 shall have been probated and good and clear abstract shall have been furnished to turn over said $800.00 the bal. to be paid in cash upon the furnishing of a clear abstract and warranty deed within 30 days from date hereof.

It is mutually agreed, by and between the parties hereto, that the time of payment shall be an essential part of this contract, and that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties.

In Testimony Whereof, Both parties have hereunto set their hands and seals the day and year hereinbefore written.

(Seal) HENRY TAYLOR,
(Seal) ANNA TAYLOR,
(Seal) J. E. PEART,

Signed, sealed and deliverance in presence of

Zenas Graham,
F. A. Warren.

State of South Dakota,
County of Moody—ss.

On this 8th day of August, in the year One Thousand
38 Nine Hundred and eight, before me, F. A. Warren, a Notary Public in and for said County and State, personally appeared Henry Taylor, Anna Taylor and J. E. Peart, known to me to be the persons who are described in and who executed the foregoing and within instrument and acknowledged to me that they executed the same.

F. A. WARREN, Not. Pub.
Moody County, So. Dak."

Said contract was acknowledged and was recorded in the office of the Register of Deeds for Moody County, South Dakota, August 29, 1908, in Book 24 at page 606.

8th.

That the said J. E. Peart, on or about September 8, 1908, assigned said contract to the defendant William W. Fletcher; that said assignment was in writing and was filed for record September 11, 1908, at ten o'clock A. M. and recorded in the office of the Register of Deeds for said county of Moody in Book 24 at page 608.

That after the execution of the said contract between the said J. E. Peart and Henry H. Taylor and wife, set out above, the said Taylor and his family took possession of said Lot one of the Northwest Quarter of Section twenty-one (21), in Township one hundred seven (107), Range forty-eight (48) described in said contract, and has since resided thereon and the said Peart took possession of the West half of the Southwest Quarter of Section twenty-two (22) and the East Half of the Southeast Quarter of Section twenty-one (21) in Township one hundred six (106) North, of Range forty-nine (49).

39

9th.

That after making said contract, as aforesaid, the said Taylor and his wife refused to sell and convey his said homestead described in said contract to the said Peart or Fletcher, and on the 21st day of November, 1908, said Fletcher, instituted a suit against said Taylor and his wife in the United States Circuit Court for the District of South Dakota, to compel the specific performance of said contract, and the original files in said suit are hereby referred to and adopted and made a part of this statement as Exhibit D, and copies thereof may be hereto attached and marked Exhibit D and submitted in lieu of the original.

10th.

That thereafter, on the 4th day of February, 1909, F. A. Spafford, of Flandreau, South Dakota, who was appointed Master to execute such deed, in the decree in said suit, executed and delivered to the defendant William W. Fletcher, a deed, a copy of which is hereto annexed, marked Exhibit E. Said deed was acknowledged and filed for record and recorded in the office of the Register of Deeds for Moody County, South Dakota, February 10, 1909, in Book 29 at page 28, and on the 5th day of February, A. D. 1909, the said William W. Fletcher executed and delivered to the defendant Louis Hemmer, a Warranty Deed, a copy of which is hereto annexed marked Exhibit F, which deed was acknowledged and filed for record and recorded in the office of the Register of Deeds of said County, February 8, 1909, in Book 30 at page 6, and the said defendant Hemmer claims to be the owner of said prem-

ises by virtue of said deed, and is and was, at the commencement of this suit, in possession of said premises.

40 11th.

That before the commencement of the suit between Fletcher and Taylor, referred to above, and after the execution of the agrement between Peart and Taylor, set out above, the defendant Peart signed, acknowledged and delivered to Jordan & Warren, who were acting as the attorneys for Taylor in said transaction, a deed, Ex. I attached, and in addition thereto the said Peart left with said Jordan & Warren the balance of the purchase price under said contract, amounting to about $1000.00, and that when Taylor was notified that the said deed and money had been left with the said Jordan & Warren he refused to receive the same, and that he has at all times since refused to receive said deed or any deed for said land, and has refused to receive said money; and thereafter, about the month of April, 1909, he attempted to remove with his family back to the said homestead property and was denied the possession thereof by the defendant Hemmer, who then claimed the same under the deed from Fletcher, referred to above, and who has at all times since denied Taylor, the possession of said premises, or any part thereof.

12th.

That on the 10th day of June, A. D. 1909, the President of the United States caused to be issued and delivered to the said Taylor a patent for said land, a copy of which is hereto annexed, marked Exhibit G, and the United States now claims to hold the title of said land in trust for the said Taylor.

41 The letters hereto annexed marked Exhibit H, consisting of a letter dated November 21st, 1907, from the Acting Commissioner of Indian Affairs to Jordan & Warren, a letter dated March 16th, 1907, from Larrabee, Acting Commissioner of Indian Affairs to S. M. Brosius; a letter, dated June 24th, 1907, from Larrabee, Acting Commissioner to the Superintendent of Riggs Institute; a letter, dated March 9, 1907, from Larrabee, Acting Commissioner of Indian Affairs, to Honorable Robert J. Gamble, are made a part of this statement, to be considered as such subject to the objection on the part of the complainant that the same are incompetent and have no binding effect on the complainant in this suit. That the defendant Peart had said letters in his possession before entering into the contract above set out with Taylor, and claims to have relied thereon in making said contract.

13th.

That in 1894, the County Treasurer of Moody County and the Auditor of said county, and the Board of County Commissioners thereof assessed said land for taxation and levied taxes thereon, and they have assessed the same for taxation and levied taxes thereon each and every year since 1894, and have caused the land to be sold for taxes, and at the time of the commencement of this suit, and at all times since they have claimed and asserted the right to assess said land for taxation and to levy taxes against the same, and do now claim such right.

14th.

That this statement of facts shall be considered as the
42 evidence in said suit, and each and all of the parties hereto expressly waive the taking of evidence in accordance with the rules of practice in equity governing the procedure in such cases, and authorize the Court to make its findings of fact and conclusions of law from the said statement of facts and to render such decree and judgment thereon as the Court shall deem proper, subject to the right of each and every party hereto to preserve such exceptions to the decision of the Court as they shall deem proper. And it is also agreed that either party may bring said suit on to be heard by the Court on said statement of facts and the pleadings by giving the opposite party ten [days] notice of such hearing, and that at such hearing the case shall be fully and finally submitted to the Court upon such arguments and briefs as the parties may desire to submit.

Dated Sioux Falls, South Dakota, this 11th day of January, A. D. 1912.

EDWARD E. WAGNER,
Solicitor for Complainant.

RICE & BENSON,
Solicitors for Defts. Peart, Fletcher & Hemmer.

FREDERICK A. WARREN,
State's Attorney for Henderson, Hornby and Moody County, Solicitors for Defendants.

"Exhibit A"

M. L. 252794

Department of the Interior

B.

General Land Office

M. F. H.

Washington, D. C. May 4, 1911.

I hereby certify that the annexed copies of papers filed with Mitchell D. T. F. C. 5414 are true and literal ex-
43 emplifications of the originals in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

(Seal of General Land Office) H. W. SARGENT,
Recorder of the General Land Office.

Homestead

Affidavit M. L. 25 2794-1

Land Office at Sioux Falls, D. T.
Oct. 7, 1878

I, Henry Taylor, of Moody County, D. T., having filed my application No. 10666 for an entry under Section No. 2289, Revised Statutes of the United States, do solemnly swear that I am an Indian formerly of the Santee Sioux tribe. That I have abandoned my relations with that tribe and adopted the habits and pursuits of civilized life. That I was born in the United States, that I now reside upon the tract of land described in my application No. 10,666; that the reason why this affidavit is sworn to before a Clerk of the District Court is on account of the great distance of the United States Land Office from my residence on said land; that said application No. 10,666 is made for the purpose of actual settlement and cultivation; that said entry is made for my own exclusive benefit, and not directly or indirectly for the benefit or use of any other person or persons whomsoever; and that I have not heretofore abandoned or perfected an entry under ~~land the benefit of~~ the homestead laws.

HENRY TAYLOR.

44 Sworn to and subscribed this 7" day of October, 1878, before me.

(Seal of Court) F. W. PETTIGREW,
Clerk of the District Court in and for Moody County, D. T.

Receiver's Receipt, No. 10666 Application No. 10666

Indian Homestead M. L. 252794-2

Receiver's Office, Sioux Falls, D. T.

Nov. 4, 1878.

Received of Henry Taylor the sum of Fourteen dollars..... Cents; being the amount of fee and compensation of Register and Receiver for the entry of The West half of the South West quarter of Section (22) and East half of the South East quarter of Section 21 in Township 106 of Range 49, under Section No. 2290, Revised Statutes of the United States.

J. W. WASHBURN,
Receiver

$14.00

Homestead

Application Indian M. L. 252794-3

No. 10666 Land Office at Sioux Falls, D. T.

Oct. 7, 1878.

I, Henry Taylor, of Moody county, D. T., do hereby apply to enter under Section 2289 Revised Statutes of the United States, the W½ SW¼ Sec. 22 & E½ SE¼ of Section 21 in Township 106, of Range 49 containing 160 acres.

HENRY TAYLOR.

Land Office at Sioux Falls, D. T.
November 4th, 1878.

I, B. F. Campbell, Register of the Land Office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter under Section 2289, Revised Statutes of the United States, and
45 that there is no prior, valid adverse right to the same

B. F. CAMPBELL,
Register.

Endorsed:—No. 10666—Indian Homestead Application—Henry Taylor, Sioux Falls, D. T., Nov. 4, 1878, Sec. 22 & 21 Town. 106 Range 49—M. L. 252794—6167.

M. L. 252794-5

I, Henry Tailor of Moody County, D. T., do solemnly swear that I am an Indian formerly of the Santee Sioux Tribe, that I was born in the United States, that I have abandoned my relations with that tribe and adopted the habits and pursuits of

civilized life that I am a single man over the age of 21 years and it is bonifide my intention in good faith to perform the duties of a citizen of the United States.

HENRY TAYLOR.

Sworn to and subscribed before me this 7″ day of Oct. 1878.

(Seal of Court) F. W. PETTIGREW,
Clerk of the District Court in
for Moody County, D. T.

We, John Tailor and Thomas K. West do solemnly swear that we are well acquainted with Henry Tailor and know that he is an Indian formerly of the Santee Sioux Tribe. That he was born in the United States. That he has abandoned his relations with that tribe and adopted the habits and pursuits of civilized life. That he is a single man over the age of 21 years.

Witness
F. W. Pettigrew,
Thomas K. West.

his
JOHN X TAILOR
mark
THOMAS K. WEST,

Sworn to and subscribed before me this 7″ day of Oct. 46 ,1878.

(Seal of Court) F. W. PETTIGREW,
Clerk of the Dist. Court in &
for Moody County, D. T.

M. L. 252794-6

M. L. 252794-7

Territory of Dakota,
County of Moody—ss:

James D. Hopkins and Job Robertson being duly sworn each for himself says that they were the witnesses in the final homestead proof of Henry Taylor under entry #5414 on the W² SW¼ 22 & E² SE¼ 21, 106-49. made in December, 188 (blot) That at that time they testified that he (Taylor) built a house on said claim in which he resided but don't remember whether or not they were asked the time he took up his residence on the land, for if they were asked such a question they would have stated (and do now swear that the claimant went to live on said claim within six months from the time he made filing on said land, claimant put up a tent and lived in that first before he built the house, and that he was living in a tent on this claim within six months from the time he made

said entry, and while they can't remember date they know that actual residence was made within the six months allowed by law.

JAMES D. HOPKINS
JOB ROBERTSON

Subscribed & sworn to before me this 2d day of August, A. D. 1887.

C. D. PRATT,
Judge and Ex-Officio Clerk of the Probate Court in and for Moody Co., Dakota.

M. L. 252794-8

Supplemental.

Affidavit of Henry Taylor H. C. #5414 C. May 7th, 87.
47 M. L. 252794-9

Territory of Dakota,
County of Moody—ss.

Henry Taylor being sworn says that he is the identical person who made final proof on the W½ SW¼ 22 & E½ SE¼ 21-106-49, under homestead entry #5414 (Indian Homestead) That he first went to live in a tent on said claim as is the custom of ~~my~~ his people, and that he made an actual residence on said claim within six months from the time he made filing on said land, that he afterwards built a house on this land, that when he made said proof he was not asked about his tent, but only asked when he built his house.

HENRY TAYLOR

Subscribed & sworn to before me this 2d day of August, A. D. 1887.

(Seal of Court)

C. D. PRATT,
Judge and Ex-Officio Clerk of the Probate Court in and for Moody Co., Dakota.

Affidavit of Publication
Notice of Final Proof
Land Office at Mitchell,
D. T. Oct. 22, 1884

Notice is hereby given that the following named settler has filed notice of his intention to make final proof in support of his claim, and that said proof will be made before the Judge and ex officio clerk of probate court of Moody county, at Flandreau, D. T., on Dec. 6, 1884, viz: Henry Taylor, Hd. No. 10666, for the W½ of SW¼ 22 and E ½ of SE¼ 21, 106-49.

48

He names the following witnesses to prove his continuous residence upon, and cultivation of said land, viz: James Hopkins, Samuel Hopkins, Wim Flute, A. Jabe, all of Egan, Moody Co., D. T. 1-9

GEO. B. EVERITT,
Register

M. L. 252794-10

Territory of Dakota,
Moody County—ss.

I, ~~A. G. Bernard~~ H. E. Hobbs, on oath, do depose and say that I am ~~publisher~~ (or foreman) of The Herald, a weekly newspaper published at Flandreau, Dakota, and that the annexed Proof Notice was published in said newspaper for ~~five~~ six consecutive weeks, and that said notice was first published in the issue of Oct. 30, 1884, and last in the issue of Dec. 4, 1884.

H. E. HOBBS

Subscribed and sworn to before me this 5th day of Dec. 1884.

F. W. PETTIGREW,
Notary Public
(Notarial Seal)

United States Land Office — Dakota.

I, Geo. B. Everitt, Register, do hereby certify that a notice (a printed copy of which is hereto attached) was by me posted in a conspicuous place in my office for a period of thirty days, as required by the Act of March 3d, 18. . . ; I having first posted said notice on the 22 day of Oct. 1884.

GEO. B. EVERITT, Register.

Receiver's Duplicate Receipt No. 10666 — Application No. 10666 M. L. 252794-11

Indian Homestead.

Receiver's Office, Sioux Falls, D. T.

November 4", 1878.

Received of Henry Taylor, the sum of Fourteen Dollars .... Cents; being the amount of fee and compensation of Register

and Receiver for the entry of W½ SW ¼ & 22 & E½
49 SE¼ of Section 21 in Township 106, of Range 49, under Section 2290, Revised Statutes of the United States.

F P H A J. M. WASHBURN, Receiver

No. 5414
Dec. 11, 84

Homestead Proof

M. L. 252794-12

Final Affidavit Required of Homestead Claimants.

Section 2291 of the Revised Statutes of the United States

I, Henry Taylor, having made a Homestead Entry of the W² SW¼ 22 & E² SE Section 21, in Township No. 106 of Range No. 49 subject to entry at Mitchell, D. T., under Section No. 2289 of the Revised Statutes of the United States, do now apply to perfect my claim thereto by virtue of Section 2291 of the Revised Statutes of the United States; and for that purpose do solemnly swear that I am a citizen of the United States; that I have made actual settlement upon, and have cultivated said land, having resided thereon since the Tenth day of June, 1879, to the present time; that no part of said land has been alienated, except as provided in Section 2288 of the Revised Statutes, but that I am the sole bona fide owner as an actual settler; that I will bear true allegiance to the Government of the United States; and further, that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States, and that this affidavit is made before the Judge of the Probate Court for Moody County, Dakota, on account of great distance from the local land office.

HENRY TAYLOR

50 I, Geo. M. De Groff, Judge and Ex Officio Clerk of the Probate Court, in and for the County of Moody, Dakota, do hereby certify that this affidavit was subscribed and sworn to before me this 6" day of December, 1884, as provided by the Amendatory act of Congress, approved March 3d, 1877.

(Seal of Court) GEO. M. DE GROFF,
Judge and Ex Officio Clerk of the Probate Court, Moody County, Dakota.

M. L. 252794-13

Non-Mineral Affidavit.

Territory of Dakota,
County of Moody—ss.

Henry Taylor, being duly sworn according to law, deposes and says that he is the identical person who is an applicant for government title to the W² SW⁴ Sec. 22 & E² SE⁴ Section 21 Township 106, Range 49 that he is well acquainted with the character of said described land, and with each and every legal sub-division thereof, having frequently passed over the same; that his knowledge of said land is such as to enable him to testify understandingly with regard thereto, that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any
51 part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not for the purpose of fraudulently obtaining the title to mineral land, but with the object of securing said land for agricultural purposes.

HENRY TAYLOR.

Subscribed and sworn to before me this sixth day of December, A. D. 1884, and I hereby certify that the foregoing affidavit was read to the said Henry Taylor previous to his name being subscribed thereto, and that deponent is a respectable person to whose affidavit, full faith and credit should be given.

(Seal of Court) GEO. W. DE GROFF,

Homestead Proof Testimony of Claimant.

M. L. 252794-14

Henry Taylor being called as a witness in his own behalf in support of Homestead entry No. 10666 for W² SW 22 & E² SE⁴ 21-106-49 testifies as follows:

Ques. 1 What is your name, written in full and correctly spelled, your age and postoffice address?

Ans. Henry Taylor, 27 years of age, Egan, Moody Co., D. T.

Ques. 2 Are you a native of the United States or have you been naturalized? Ans. Indian Santee Sioux Tribe.

Ques. 3 When was your house built on the land, and when when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans. June 10", 1879, and I established actual residence same time Log house 14x14 15 acres cultivated. Value of improvements $100.00.

52 Ques. 4. Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried, state the fact).

Ans. No family single man I have resided there continuously.

Ques. 5. For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and if temporarily absent, did your family reside upon and cultivate the land during such absence?

Ans. I have not been absent.

Ques. 6 How much of the land have you cultivated, and for how many seasons have you raised crops thereon?

Ans. 15 acres. Raised crops 6 seasons.

Ques. 7 Are there any indications of coal, salines, or minerals of any kind on the land, and is the land more valuable for agricultural than for mineral purposes?

Ans. No. More valuable for agriculture.

Ques. 8. Have you ever made any other homestead entry? (If so, describe the same) Ans. No.

Ques. 9. Have you sold, conveyed or mortgaged any portion of the land, and if so, to whom and for what purpose?

Ans. No.

HENRY TAYLOR.

I hereby certify that the foregoing testimony was read to the claimant before being subscribed, and was sworn to before me this 6" day of December, 1884, as provided by the amendatory act of congress, approved March 3d, 1877.

(Seal of Court) GEO. M. DE GROFF,
Judge and Ex Officio Clerk of the Probate Court in and for Moody County, Dakota Territory.

(See note on fourth page)

53 Homestead Proof Testimony of Witness

M. L. 252794-15

Samuel Hopkins being called as a witness in support of the Homestead entry of Henry Taylor for W^{2} SW^{4} 22 & E^{2} SE^{4} Sec. 21 Tp. 106, Range 49 testifies as follows:

Ques. 1 What is your occupation and where is your residence. Ans. Farmer. Egan, Moody Co., D. T.

Ques. 2. Have you been well acquainted with Henry Taylor the claimant, in this case ever since he made his Homestead Entry No. 10666. Ans. Yes.

Ques. 3 Was claimant qualified to make said entry? (State whether the settler was a citizen of the United States, over the age of twenty-one years, or the head of a family, and whether he ever made a former homestead entry.)

Ans. Yes he was an Indian had abandoned his tribal relations was over 21 years of age and had never made a former homestead entry.

Ques. 4. When did claimant settle upon the homestead, and at what date did he establish actual residence thereon? (Describe the dwelling and other improvements, giving total value thereof.)

Ans. June 10" 1879, and established his actual residence same time. Log house 14X14 15 acres cultivated. Value $100.

Ques. 5. Have claimant and family resided continuously on the homestead since first establishing residence thereon?

54 Ans. Claimant has resided thereon continuously single man no family.

Ques. 6. For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence.

Ans. He has not been absent at all.

Ques. 7 How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon.

Ans. 15 acres. Raised crops thereon 6 seasons.

Ques. 8 Are there any indications of coal, salines, or other minerals of any kinds on the homestead? (If so describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No. More valuable for agriculture.

Ques. 9 Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

Ans. No.

Ques. 10. Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. No. I think he has. I am not related to claimant.

SAMUEL HOPKINS.

I hereby certify that the witness is a person of respectability; that the foregoing testimony was read to him before being subscribed, and was sworn to before me this 6″ day of December, 1884, as provided by the amendatory act of congress approved March 3d, 1877.

(Seal of Court) GEO. M. DE GROFF,
Judge and Ex Officio Clerk of the Probate Court in and for Moody County, Dakota Territory.

(See note on fourth page)

55 Homestead Proof Testimony of Witness

M. L. 252794-16

James Hopkins, being called as a witness in support of the Homestead entry of Henry Taylor for W² SW¼ 22 & E² SE¼ Sec. 21 Tp. 106 R. 49 testifies as follows:

Ques. 1. What is your occupation, and where is your residence?

Ans. Farmer Egan, Moody Co., D. T.

Ques. 2 Have you been well acquainted with Henry Taylor, the claimant, in this case ever since he made his Homestead Entry No. 10666.

Ans. Yes.

Ques. 3. Was claimant qualified to make said entry? (State whether the settler was a citizen of the United States, over the age of twenty-one years, or the head of a family, and whether he ever made a former homestead entry)

Ans. Yes he was an Indian had abandoned his tribal relations was over 21 years of age and had never made a former homestead entry.

Ques. 4. When did claimant settle upon the homestead, and at what date did he establish actual residence thereon? (Describe the dwelling and other improvements, giving total value thereof.)

Ans. June 10″ 1879 and he established actual residence same time. Log house 14 x 14 25 acres cultivated Value ″100.

Ques. 5 Have claimant and family resided continuously on the homestead since first establishing residence thereon?

Ans. Claimant has resided thereon continuously. No family single man.

Ques. 6 For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's
56 family reside upon and cultivate the land during such absence?

Ans. He has not been absent at all.

Ques. 7. How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon.

Ans. 15 acres. Raised crops there 6 seasons.

Ques. 8. Are there any indications of coal, salines or other minerals of any kinds on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes)

Ans. No More valuable for agriculture.

Ques. 9. Has the claimant mortgaged, sold or contracted to sell, any portion of said homestead?

Ans. No.

Ques. 10. Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry.

Ans. No. I think he has. I am not related to claimant.

JAMES HOPKINS

I hereby certify that the witness is a person of respectability; that the foregoing testimony was read to him before being subscribed, and was sworn to before me this 6" day of December, 1884, as provided by the amendatory act of congress approved March 3d, 1877.

(Seal of Court) GEO. M. DE GROFF.
Judge and Ex Officio Clerk of the Probate Court in and for Moody County, Dakota Territory.

(See note on fourth page)

57 Note. If naturalized, the claimant must file a certified copy of his certificate of naturalization. In a commuted homestead a foreign-born claimant, if not naturalized, must file a certified copy of his declaration of intention. In making proof, the party must surrender his original duplicate receipt or file affidavit of its loss.

Note The officer before whom the testimony is taken should call the attention of the witness to the following Section of the Revised Statutes, and State to him, that it is the purpose of the Government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law.

Title LXX—Crimes—Ch. 4

Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, deposition, declaration or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years, and shall, morever, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. Sec. 1750.

(Endorsed)—Homestead Proof—Land Office at Mitchell, D. T.—Original Application No. 10666. Final Certificate No. 5414. Approved: Geo. B. Everritt, Register, Hiram Baileu, Jr., Receiver—Henry Taylor M. L. 252794-16

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58 Final Receiver's Receipt No. 5414

Application No. 10666

Indian Homestead M. L. 252794-17

Receiver's Office,

December 11, 1884.

Received of Henry Taylor, the sum of Four dollars..... cents, being the balance of payment required by law for the entry of West½ South West 22 and East½ Southeast of Section 21 all in Township 106 N. of Range 49 W 5 P. M. containing 16000 acres, under Section 2291 of the Revised Statutes of the United States.

HIRAM BAILEU, JR.
Receiver.

$4.00.

1

Refer in reply to the following: M. L. 252794-18

Land— Department of the Interior Address only
Allotment the Commis-
Office of Indian Affairs sioner of
21622-1907 JAR Indian Affairs
X B Washington
27958-1909 Filed May 12, 1909

Transmitted Patent

33254-1909 F. C. 5414 W. R. L.
Ans 11/84 2 Ex. J.
J, T. R. Orig. 1066 G. F. H.

Patent to Henry Taylor 53845
Registered G. L. O. May 15, 1909
Referred to
T. B. Assigned to C. C. R.
Answered by J. C. H.
Received Noted 6/5/09
May File
14 No Ans.
1909 J. C. H.
G. L. O. 5/27

Recd. 5/24—4 P. M.

The Honorable,
The Secretary of the Interior.

Sir:

On October 6, 1878, Henry Taylor made homestead entry on the W/2 of the SW/4 of Sec. 22, and the E/2 of SE/4 of Sec. 21, T. 106, N., R. 49 W., his application having been
59 filed in the local land office at Sioux Falls, South Dakota.

The original application was filed under the Act of May 20, 1862 (12 Stat. L. 392), and the word "Indian" was noted in red ink in the application beneath the word "homestead", and similar notations were made on receipts and certificates issued to Taylor under Section 2290 and 2291 of the Revised Statutes.

Final certificate of homestead entry issued December 11, 1884, and a patent was issued by the land office under date of June 6, 1890, which patent contained the following clause:

L-21622-2 M. L. 252794-19

This patent is issued upon the express condition that the title hereby conveyed shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree or order of any court, or subject to taxation of any character, but shall remain inalienable, and not subject to taxation for the period of twenty years from the date hereof, as provided by the Act of Congress approved January 18, 1881.

As Taylor's patent was issued in accordance with the provisions of the Act of January 18, 1881, (21 Stat. L., 315) it is evident his homestead entry was treated as having been made under the Act of March 3, 1875 (18 Stat. L., 402) instead of the Act of May 20, 1862 supra.

The Act under which this patent was issued applies specifically to the Winnebago Indians in Wisconsin, and at the time of its issuance the Act of July 4, 1884, (23 Stat. L. 76-96), was in effect; and the Office is of the opinion that the
60 patent issued to this Indian should have been under the provisions of the act last named, which provides for a 25-year trust period from the date of the patent.

Correspondence on file shows that, presumably owing to an error in the issuance of this patent, the lands held by this Indian have been sold under tax sale and the purchaser thereof has ejected the Indian claimant from the premises. The matter has been taken up with the Attorney General with the request that proper proceedings be instituted to protect the rights of Henry Taylor.

L-21622-3 M. L. 252794-20

It is respectfully recommanded, therefore, that the Commissioner of the General Land Office be instructed to cancel the record of the prior issuance of a patent in this case and to issue a new patent to Henry Taylor for the W/2 of the SW/4 of Sec 22, and the E/2 of the SE/4 of Sec. 21, T. 106 N., R. 49 W., under the provisions of the Act of July 4, 1884, supra.

It is recommanded further that this matter be made special, and the Commissioner of the General Land Office be instructed to issue patent at the earliest practicable date in order that it may be forwarded to the Department of Justice for use in connection with such proceedings as may be instituted in Taylor's behalf.

Very respectfully,

ME-8 R. W. VALENTINE,
840 Acting Commissioner.

61 May 12, 1909.

Approved and referred to the Commissioner of the General Land Office for action in accordance with the foregoing recommendations.

FRANK PIERCE,
First Assistant Secretary.

Indian
Homestead.

Land Office at Mitchell, D. T.
Dec. 11, 1884.

Final Certificate No. 5414 Application No. 10666

It is hereby certified, that, pursuant to the provisions of Section No. 2291, Revised Statutes of the United States,

Henry Taylor, has made payment in full for West ½ South West ¼ Section Twenty Two and East ½ South East ¼ of Section No. Twenty one, in Township No. One Hundred Six N. of Range No. Forty nine W, of the 5th Principal Meridian, containing 160 acres.

Now, therefore, be it known, That on presentation of this Certificate to the Commissioner of the General Land Office, the said Henry Taylor shall be entitled to a Patent for the Tract of Land above described.

The patent in this case is subject to the 20 years limit clause

GEO. B. EVERETT,
Register

~~(See 23 Stat. 96) Circular of Jan'y 1, 1889 page 102, F. R.~~ see Circular of March 1, 1884 page 26 F. R.

(Endorsed on back) Final Certificate No. 5414—Homestead Application No. 10666—Reissue—Land Office at Mitchell, D. T.—Dec. 11, 1884 Sect. 21, Town 106, Range 49— To R. & R. May 7/87 J. McK. Recommended for patent and referred to Div. O. Nov. 5/87, P. J. Mischaux, Div. Ex'r.—June 7/09 Canceled Record by Sec'y's order of May 12/09. "B" List. H. W. Sanford Recorder, No. 57—Approved ~~Sept. 1, 1885,~~ J. McK., Clerk—Pat. No. 66400. Ex. June 10, 1909. Division C. Patented June 6, 1890, 18. . . .—Ex. J. Ex.—Recorded Vol. 9 Pages 313 to 314 6/67 09-96184.—Pat sent to the Indian Office.

"Exhibit E"

This Indenture made this 4th day of February, A. D. 1909, by and between F. A. Spafford, Special Master in Chancery, duly appointed and hereinafter mentioned party of the first part and William W. Fletcher, party of the second part.

Witnesseth, That on the 30th day of December, A. D. 1908, a Decree was entered in the above entitled action, the same being in words and figures as follows: This cause came on to be heard at this term and was submitted upon Bill and Answer and upon written Briefs furnished by counsel and thereupon upon consideration thereof, it is

Ordered, Adjudged and Decreed as follows: That that certain contract made and entered into by one J. E. Peart and Henry Taylor dated the 8th day of August, A. D. 1908, and filed for record in the office of the Register of Deeds of Moody County, South Dakota, on the 29th day of August, A. D. 1908, and recorded in Book 24 of Deeds on page 606, which

said contract was subsequently assigned by said J. E. Peart to William W. Fletcher by an instrument in writing, filed for record in the office of the Register of Deeds of Moody County South Dakota, on the 11th day of September, A. D. 1908, and recorded in Book 24 of Deeds on page 208, be specifically performed, and that said Henry Taylor and Anna Taylor make, execute and deliver to the said William W. Fletcher a
63 good and sufficient deed of conveyance to the premises in said contract described, to-wit, The East Half of the Southeast Quarter (E½ SE¼) of Section Twenty-One (21), Township One Hundred Six (106), Range Forty-nine (49), Moody County, South Dakota, upon the said William W. Fletcher paying to the said Henry Taylor and Anna Taylor the consideration in said contract mentioned, to-wit: the sum of Twenty-four Hundred Dollars ($2400.00), and that if the said Henry Taylor and Anna Taylor the said defendants, refuse to so execute and deliver to said William W. Letcher the deed conveying said premises aforesaid within thirty days from the entering of this Decree, then F. A. Spafford of Flandreau, S. D. be and he hereby is appointed Master to execute and deliver to said William W. Fletcher a Deed of conveyance to said premises, and that such deed shall in all respects be of the same force and effect as if made, executed and delivered by the said Henry Taylor and Anna Taylor.

It is further ordered that the complainant recover from defendants his costs and disbursements in this action to be hereafter taxed according to the rules of this Court in the sum of ..... Dollars and interest herein.

Dated this 30th day of December, A. D. 1908.

By the Court:
JOHN E. CARLAND, Judge.

Attest: Oliver S. Pendar, Clerk.
By Odin R. Davis, Deputy.

Endorsed: In the Circuit Court of the United States in and for the Southern Division of the District of South Da-
64 kota. William W. Fletcher vs. Henry Taylor and Anna Taylor. Final Decree. Rice & Benson, Attorneys for Complainant, Flandreau, South Dakota. Filed December 30th, 1908, Oliver S. Pendar, Clerk, By Odin R. Davis, Deputy.

And whereas a duly certified copy of said Decree having been filed in the office of the Register of Deeds of Moody County, South Dakota, on the 20th day of January, A. D. 1909, and recorded in Book 8 of Miscellaneous Records on page 208, and

whereas F. A. Spafford of the County of Moody and State of South Dakota was by said Decree appointed Special Master in Chancery to execute and deliver to said William W. Fletcher, a deed of conveyance to said premises in case of the continued refusal by Henry Taylor and Anna Taylor for more than thirty days after the entry of said decree to so execute and deliver said deed, and whereas more than thirty days have expired since the making and entering of said Decree, and the said Anna Taylor and Henry Taylor during all of said time have refused and now refuse to make, execute and deliver to the plaintiff a deed conveying said premises as directed in said decree, and the said William W. Fletcher having demanded a deed of conveyance pursuant to said decree.

Now, this Indenture Witnesseth, That the said party of the first part pursuant to the authority and direction to him given by the Decree hereinbefore mentioned, and in consideration of the sum of Twenty-four Hundred Dollars ($2400.00), the amount in said Decree specified, have granted, bargained, sold, aliened, conveyed and confirmed and by these pres-
65 ents does grant, bargain, sell, alien and confirm unto the party of the second part, his heirs or assigns, all the estate, right, title, interest, claim or demand of the said Henry Taylor and Anna Taylor in and to all and singular the premises described in said Decree, to-wit: the East Half of the South East Quarter (E½ SE¼) of Section Twenty-one (21), Township One Hundred Six (106), Range Forty-nine (49), Moody County, South Dakota, together with all and singular the hereditaments and appurtenances to the same belonging or in anywise appertaining, and the reversion and reversions, remainder or remainders, rents, issues and profits thereof and of every part thereof, to have and to hold the said above bargained premises with the appurtenances and every part thereof unto the said party of the second part, his heirs and assigns forever in as full and ample a manner as if this indenture had been signed, sealed and delivered by the said Henry Taylor and Anna Taylor personally in a regular and lawful manner.

In Witness Whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

F. A. SPAFFORD.

Signed, sealed and
delivered in presence of

Ira F. Blewitt,
Verna Eick.

State of South Dakota,
County of Moody—ss.

On this 4th day of February, A. D. 1909, before me the undersigned, a Notary Public within and for said County
66 of Moody and State of South Dakota, personally appeared F. A. Spafford, known to me to be the person who is described in the Decree incorporated in the within and foregoing instrument as the Special Master in Chancery appointed to make the within deed, and who executed said Deed and acknowledged to me that as such Special Master he executed the same.

(Notary Seal) IRA F. BLEWITT, N. P.

Filed for record this 10th day of February, A. D. 1909, at 1 o'clock P. M. in Book 29 of Deeds on page 28.

TOLLEF JOHNSON,
Reg. of Deeds.

"Exhibit F".

This Indenture made this 5th day of February, A. D. 1909, by and between William W. Fletcher of the County of Pipestone, and State of Minnesota, party of the first part, and Louis Hemmer, of the County of Moody and State of South Dakota, party of the second part,

Witnesseth: That the said party of the first part, for and in consideration of the sum of Twenty-five Hundred Fifty Dollars ($2550.00) to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns, Forever, all those tracts or parcels of land lying and being in the County of Moody and State of South Dakota, and described as follows, to-wit: The East Half of the Southeast Quarter (E½ SE¼) of Section Twenty-one (21), and the West Half of the Southwest Quarter (W½ SW¼) of Section Twenty-
67 two (22), all in Township One Hundred Six (106), Range Forty-nine (49), West of the 5th P. M., which said premises the grantor has never resided upon and the same has never been and is not now grantors homestead.

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining unto the said party of the second part, his heirs and assigns, Forever, And the said party of the first part, for himself his heirs, executors and administrators, does covenant with the said party of the second part, his heirs and

assigns, that he is well seized in fee of the lands and premises aforesaid, and has good right to sell and convey the same in manner and form aforesaid, and that the same are free from all encumbrance, and the above bargained and granted lands and premises in the quiet and peacable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, by, through or under this grantor, said party of the first part will warrant and defend.

In Witness Whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

WILLIAM W. FLETCHER.

State of South Dakota,
County of Moody—ss.

On this 5th day of February, A. D. 1909, before me, the undersigned, a Notary Public within and for said County and State, personally appeared William W. Fletcher, known to me to be the person who is described in and who
68 executed the within and foregoing instrument, and acknowledged to me that he executed the same.

LEWIS BENSON,
Notary Public.

I hereby certify that the within instrument was filed in this office for record on the 8th day of February, A. D. 1909, at 8 o'clock A. M., and was duly recorded in Book 30, of Deeds on page 6.

TOLLEF JOHNSON,
Reg. of Deeds.

"Exhibit G"

53845-09 4-401-ty.

33254-09 I. O.

The United States of America, To all of whom these presents shall come—Greeting:

Certificate No. 5414.

Application 10666.

Whereas, There has been deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Mitchell, Dakota, whereby it appears that pursuant to the provisions of the Revised Statutes of the United States, Chapter five, Title thirty-two, in relation to Homesteads on the Public Lands, and supplemental Statutes, and

of the Act of Congress of July 4, 1884, entitled "An Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian Tribes for the year ending June thirtieth, eighteen hundred and eighty-five, and for other purposes," the claim of Henry Taylor has been established
69 and duly consummated in conformity to law for the west half of the southwest quarter of Section twenty-two and the east half of the southeast quarter of Section twenty-one in Township one hundred six north of Range forty-nine west of the Fifth Principal Meridian, South Dakota, containing one hundred sixty acres, according to the Official Plat of the Survey of the said land returned to the General Land Office by the Surveyor General.

Now Know Ye, That the United States of America, in consideration of the premises, and in accordance with the provisions of the said Act of Congress of July 4, 1884, hereby declares that it does and will hold the land above described for the period of twenty-five years in trust for the sole use and benefit of the said Henry Taylor, or in case of his decease of his widow and heirs, according to the laws of the State where such land is located, and at the expiration of said period the United States will convey the same by patent to the said Henry Taylor, or his widow and heirs as aforesaid in fee, discharged of said trust and free of all charge or incumbrance whatsoever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted as provided by law.

This patent is issued in lieu of one containing the twenty-year trust clause, dated June 6, 1890, which has been canceled.

70 In Testimony Whereof, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the tenth day of June, in the year of our Lord one thousand nine

hundred and nine, and of the Independence of the United States the one hundred and thirty-third.

By the President: WM. C TAFT,
By W. W. Young, Secretary.

H. W. SARGENT,
Recorder of the General Land Office.

(Seal of United)
(States General)
(Land Office.)

Patent Number
Recorded 66400 Vol. Page.

"Exhibit H".

Refer in Reply to the following: MCP

Land 90017-1907
302

Department of the Interior
Office of Indian Affairs,
Washington. November 21, 1907.

Subject: Relative to taxing the lands of Henry Taylor.

Messrs. Jordan & Warren,
Flandreau, South Dakota.

Gentlemen:

The office is in receipt of your letter of the 9th instant, relative to the right of the State of South Dakota to
71 tax the homestead of Henry Taylor, an Indian.

In this connection you say:

What we want to know is this, what is the proper procedure for us to take? Our client has not paid these taxes, relying upon his statements in his patent. Now if we are compelled to pay the State and County these taxes, what right of recovery would we have against the National Government.

This matter has been thoroughly discussed by the Office heretofore. In Office letter of March 9, 1907, (L.21027-05) addressed to Honorable Robert J. Gamble, this same question was passed on, and a copy of the letter was inclosed for Mr. Taylor. On March 1, 1907, Mr. S. M. Brosius, agent of the Indian Rights Association, Washington, D. C., transmitted to the Office a letter from your firm requesting information on this subject. A copy of Office reply of March 16, 1907, (L. 21622-07) addressed to Mr. Brosius concerning this matter,

is enclosed for your information. You will readily see by examining the letter that in the opinion of the Office, your client would have no right of recovery against the National Government, in the event that the State of South Dakota forces him to pay taxes on his homestead.

Very respectfully,
C. F. LARRABEE,
Acting Commissioner.

WRL:LM
Inclosure.

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72 Ex. H.—2.

Refer in Reply to the Following:

Land
21622-1907

Department of the Interior,
Office of Indian Affairs,
Washington. March 16, 1907.

Mr. S. M. Brosius,
Agent Indian Rights Association,
Washington, D. C.

Sir:

The Office is in receipt of your letter of March 1, 1907, enclosing one from Messrs. Jordan and Warren, Attorneys at Law, Flandreau, South Dakota, relative to the right of the State of South Dakota to tax the homestead of Henry Taylor, an Indian.

Messrs. Jordan and Warren claim that since the homestead certificate No. 5414, was issued under the Act of May 20, 1862, it is subject to taxation after five years from the date of issuance, although there is a condition in the patent which exempts the land from taxation for 20 years under authority of the Act of Congress approved January 18, 1881.

In this connection you say that you note the decision of Judge Hanford in the United States Circuit Court (96 Fed. Rep. 268) and where such a provision is improperly incorporation in the homestead certificate issued under the Act of March 3, 1875, the question whether or not the law laid down in that decision will apply to the Act of May 20, 1862,
73 is not determined, and that you would be obliged for information on this subject as it is of vital importance to the Indian allottee.

It appears from the records of this and the General Land Office that on October 7, 1878, Henry H. Taylor made homestead entry No. 10666 for the W/2 of the Se/4 of Sec. 21, and the E/2 of the SW/4 of Sec. 22, T. 106 N., R. 49 W., of the 5th P. M., under the Act of May 20, 1862 (12 Stat. L. 392) final

certificate No. 54104 issuing December 11, 1884. Patent for this entry was issued June 6, 1890, under the Act of June 18, 1881, and contains a 20-year trust clause.

The Act of May 20, 1862, under which this entry was made was an act to secure homesteads to actual settlers on the public domain, and to be entitled to these benefits an applicant must show qualifications as a citizen of the United States.

While the application of Taylor was made under the Act of 1862, as a citizen of the United States, patent was issued to him under the act of 1881; yet upon the showing made in the application and in his final proof in support of his entry, he possessed the qualifications prescribed by the sixth section of the Act of February 8, 1887 (24 Stat. L., 388), and he was therefore entitled as a citizen of the United States to exercise the rights carried by the Act under which his entry was made, and to the issuance of the usual homestead patent. As a citizen he became amenable to the laws of the State, both civil and criminal. Among the laws to which he became subject were those in respect to taxation:

74 "By his voluntary act, his declaration of citizenship under oath, and his accepting the conditions imposed by homestead entry for the tract in question, he acknowledged that he laid no further claim to the guardianship of his person by the United States. That relationship ceasing, all obligations on the part of the Government towards him as an Indian, except such as are enjoyed by citizens in common, are canceled. The protection afforded by Congress and by this Department to the Indians while in a state of dependency ceases when the state of pupilage or wardship of the latter no longer exists". (See 27 L. D. 502-504).

The Issuance of patent to Taylor containing restrictions on alienation and decreeing the land as not being subject to taxation for 20 years was clearly an error, as there was no authority of law for the issuance of such patent to a citizen of the United States and the mere fact that such patent was issued would not, in the opinion of the Office, relieve the patentee from the payment of taxes assessed against the land covered thereby. He could not well be a citizen entitled to make homestead entry under the Act of 1862, and be exempt, as an Indian, from the payment of taxes on lands acquired as a citizen, when such lands became subject to taxation. As it is manifest that the courts would enforce the levy of taxes imposed should the case come before them for adjudication, the Office can extend no relief to Mr. Taylor by an attempt to uphold the trust expressed in the patent as it is believed that the decision laid

down by Judge Hanford in 96 Fed. Rep. 288 would ap-
75 ply with even more force to this entry.

Very respectfully,
(Signed) C. F. LARRABEE,
Acting Commissioner.

AGE: Ph.

Ex. H. - 3.

Copy.

Land
55472-1907.

Washington, June 24, 1907.

The Superintendent,
Riggs Institute,
Flandreau, S. Dak.

Sir:

The Office is in receipt of your letter of June 14, 1907, with reference to homestead application No. 10666, made by Henry Taylor, a Flandreau Indian, covering the W/2 of SW/4 of Sec. 22, and the E/2 of SE/4 of Sec. 21, T. 106 N., R. 49 W. of the 5th P. M., which you say is on the tax list of Moody County, South Dakota, notwithstanding the patent issued thereon contains a trust clause.

It appears from the records of this and the General Land Office that on October 7, 1978, Henry H. Taylor made homestead entry No. 10666 for the W/2 of SE/4 of Sec. 21, and the E/2 of the SW/4 of Sec. 22, T. 106 N. R. 49 W. of the 5th principal meridian, under the act of May 20th, 1862 (12 Stat. L., 392) final certificate No. 54104 issuing December 11, 1884. Patent for the entry was issued June 6, 1890, under the act of June 18, 1881, and contains a 20 year trust clause.

76 The Act of May 20, 1862, under which this entry was made, was an act to secure homesteads to actual settlers on the public domain, and to be entitled to these benefits an applicant must show qualifications as a citizen of the United States. While the application of Taylor was made under the act of 1862, as a citizen of the United States, patent was issued to him under the act of 1881; yet upon the showing made in the application and in his final proof in support of his entry, he possessed the qualifications prescribed by the sixth section of the act of February, 8, 1887 (24 Stat. L., 388), and he was, therefore entitled as a citizen of the United States to exercise the rights carried by the act under which his entry was made,

and to the issuance of the usual homestead patent. As a citizen he became amenable to the laws of the State, among which were those in respect to taxation:

"By his voluntary act, his declaration of citizenship under oath, and his accepting the conditions imposed by homestead entry for the tract in question, he acknowledged that he laid no further claim to the guardianship of his person by the United States. That relationship ceasing, all obligations on the part of the Government towards him as an Indian, except such as are enjoyed by citizens in common, are canceled. The protection afforded by Congress and this Department to the Indians while in a state of dependency ceases when the state of pupilage or wardship of the latter no longer exists." (See 27 L. D. 502-504).

The issuance of patent to Taylor containing restrictions on alienation and decreeing that the land is not subject to taxation for 20 years, was clearly an error, as there was no
77 authority of law for the issuance of such patent to a citizen of the United States; and the mere fact that such patent was issued would not, in my opinion, relieve the patentee from the payment of taxes assessed against the land covered thereby. He could not well be a citizen entitled to make homestead entry under the act of 1862, and be exempt as an Indian, from the payment of taxes on lands acquired as a citizen when such lands became subject to taxation. As it is manifest that the courts would enforce the levy of taxes imposed should the case come before them for adjudication, the Office can extend no relief to Taylor by an attempt to uphold the trust expressed in the patent.

It would seem that unless Taylor can secure the money otherwise, his best policy would be to sell a part of the land that he may secure money to pay the taxes on the remainder, if the whole is not to be lost.

Very respectfully,

(Signed) C. F. LARRABEE,
Acting Commissioner.

AGE:Ph

78 Ex. H.—4.

J. F. N.

Refer in Reply to the Following:
Land
21027-1907. Department of the Interior,

Office of Indian Affairs,

Washington, March 9, 1907.

Hon. Robert J. Gamble,
United States Senate,
Washington, D. C.

Sir:

I am in receipt of your letter of February 28, 1907, enclosing for consideration a letter to you from Anna H. Taylor, of Flandreau, South Dakota, relative to the payment of money withheld from her minor children and taxes on a tract of land, title to which is held in trust by the Government for Henry H. Taylor, a member of the Sisseton and Wahpeton tribe. You refer to a communication from Henry H. Taylor previously referred, concerning the same matter and ask that you be advised relative thereto in a communication which you can refer to the writer.

Mrs. Taylor refers to the payment of money to the Sisseton Indians in the fall of 1906, at which time she drew $50 for herself and attempted to draw $50 for each of her two children, and says that the Indian Agent then informed her that she could not secure the children's money as it would be held in trust for them. She enclosed copy of patent issued to her husband, which contains a trust clause, and says the officials of Moody County, South Dakota, have requested pay-
79 ment of delinquent taxes on the land covered thereby from the year 1890; that she was informed by an Inspector whose name she does not recall, and Superintendent Pierce of the Flandreau School, that the land was not subject to taxation; that the due and unpaid taxes amount to about $200, but that she and her husband have only half that amount available, and asks that you procure special authority for the payment of the money due the children that it may be applied to the payment of the taxes.

The letter from Henry H. Taylor is to the same effect, and enclosed therewith is notice of a tax sale of the W. ½ of the SW. ¼ of Sec. 22, T. 106 N., R. 49 W., being a part of the land embraced in his homestead. From the notice it appears that there was on November 28, 1904, $28.59 taxes due and unpaid.

It appears from the records of this and the General Land Office that on October 7, 1878, Henry H. Taylor made home-

stead entry No. 10666 for the W½ of the SE¼ of Sec. 21, and the E½ of the SW¼ of Sec. 22, T. 106, N., R. 49 W., of the 5th principal meridian, under the Act of May 20, 1862, (12 Stat. L., 392), final certificate No. 54104 issuing December 11, 1884. Patent for this entry was issued June 6, 1890, under the Act of June 18, 1881, and contains a 20 year trust clause.

The Act of May 20, 1862, under which this entry was made, was an Act to secure homesteads to actual settlers on the public domain, and to be entitled to these benefits an applicant must show qualification as a citizen of the United States.

80 While the application of Taylor was made under the Act of 1862, as a citizen of the United States, patent was issued to him under the Act of 1881; yet upon the showing made in the application and in his final proof in support of his entry, he possessed the qualifications prescribed by the sixth section of the Act of February 8, 1887 (24 Stat. L., 388), and he was therefore entitled as a citizen of the United States to exercise the rights carried by the Act under which his entry was made, and to the issuance of the usual homestead patent. As a citizen he became amenable to the laws of the State, both civil and criminal. Among the laws to which he became subject were those in respect to taxation:

"By his voluntary act, his declaration of citizenship under oath, and his accepting the conditions imposed by homestead entry for the tract in question, he acknowledged that he laid no further claim to the guardianship of his person by the United States. That relationship ceasing, all obligations on the part of the Government towards him as an Indian, except such as are enjoyed by citizens in common, are canceled. The protection afforded by Congress and by this Department to the Indians while in a state of dependency ceases when the state of pupilage or wardship of the latter no longer exists." (See 27 L. D. 502-504).

The issuance of patent to Taylor containing restrictions on alienation and decreeing the land as not being subject to taxation for 20 years, was clearly an error, as there was no authority of law for the issuance of such patent to a citi-
81 zen of the United States, and the mere fact that such patent was issued would not, in my opinion, relieve the patentee from the payment of taxes assessed against the land covered thereby.

He could not well be a citizen entitled to make homestead entry under the Act of 1862, and be exempt, as an Indian, from the payment of taxes on lands acquired as a citizen when

such lands became subject to taxation. As it is manifest that the courts would enforce the levy of taxes imposed should the case come before them for adjudication, the Office can extend no relief to Taylor by an attempt to uphold the trust expressed in the patent. Anna H. Taylor and her minor children, Lydian R. and Hiram A., are duly enrolled members of the Sisseton Wahpeton tribe, and as such entitled to participate in the distribution of tribal funds such as the per capita payment of $100,000 made in the second quarter of the fiscal year 1907.

The instructions governing the payment made provided that the shares of all minors be returned to the Treasury of the United States to be held there for them until they attain their majority and are competent to receive and receipt therefor themselves. Nor can the office in justice to the children pay over to Mrs. Taylor the money due them and held in trust during their minority.

It would seem therefore, that unless the Taylors can secure the money otherwise, that their best policy would be to sell a part of the land that they may secure money to pay the taxes on the remainder if the whole is not to be lost.

82 The references are herewith returned, together with a copy of this letter for your correspondent.

Very respectfully,

C. F. LARRABEE,
Acting Commissioner.

AGE:Ph.

Exhibit I.

This Indenture, made this 13th day of February, in the year of our Lord one thousand nine hundred nine between John E. Peart and Anna M. Peart his wife of Flandreau City of the County of Moody and State of South Dakota parties of the first part, and Anna Taylor of Flandreau post office of the County of Moody and State of South Dakota party of the second part.

Witnesseth, That the said parties of the first part, for and in consideration of the sum of Five Hundred and fifty ($550.-00) Dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do hereby Grant, Bargain, Sell and Convey unto the said party of the second part, her heirs and assigns, Forever, all that tract or parcel of land lying and being in the County of Moody and State of South Dakota, described as follows, to-wit: Lot

One (L. 1) of the North West Quarter (NW¼) of Section Twenty-one (Sec. 21) Township One Hundred Seven (Twp. 107) North, Range Forty-eight (R. 48) West of the Fifth P. M. Moody County, South Dakota.

83 To Have And To Hold The Same, Together with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining, to the said party of the second part her heirs and assigns, Forever, And the said John E. Peart and Anna M. Peart his wife parties of the first part for themselves and their heirs, executors and administrators, do covenant with the party of the second part, her heirs and assigns, that they are well seized in fee of the lands and premises aforesaid, and have good right to sell and convey the same in manner and form aforesaid; and that the same are free from all incumbrances and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, her heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said parties of the first part will Warrant And Defend.

In Testimony Whereof, The said parties of the first part, have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered in Presence of

JOHN E. PEART (Seal)
ANNA M. PEART (Seal)

F. A. Warren,

State of South Dakota,
County of Moody—ss.

On this 13th day of February in the year one thousand nine hundred and nine, before me, F. A. Warren a Notary Public in and for said County and State, personally appeared John E. Peart and Anna M. Peart his wife to me known to
84 be the persons who are described in and who executed the foregoing instrument, and acknowledged to me that they executed the same

(Notarial Seal)

F. A. WARREN,
Notary Public.

Endorsed: Agreed Statement of Facts, Filed in the District Court on Feb. 8, 1912.

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86 Decree.

In the District Court of the United States, District of South Dakota, Southern Division.

The United States of America, Complainant,
#573. vs. In Equity.
Louis Hemmer, William H. Fletcher, J. E. Peart, Richards Trust Company, Iowa and Dakota Land Company, Fred D. Henderson, as Treasurer of Moody County, South Dakota, E. A. Hornby, as Auditor of Moody County, South Dakota, Job Robinson, S. W. Ballard and L. W. Ballard, co-partners as Ballard & Son, and Moody County, South Dakota, Defendants.

At the October term of the Circuit Court of the United States for the District of South Dakota, in said Circuit, held at the United States Court room at the City of Sioux Falls, on the 8th day of February, A. D. 1912, this Court having succeeded to the jurisdiction of said Circuit Court by operation of law.

Present, the Honorable James D. Elliott, District Judge:

This cause came on to be heard on the 8th day of February, A. D. 1912, Edward E. Wagner, United States Attorney for the District of South Dakota, appearing for complainant: Messrs. Rice & Benson appearing for the Defendants Louis Hemmer, William W. Fletcher and J. E. Peart; Ira F. Blewitt appearing for S. W. Ballard and L. W. Ballard, co-partners as Ballard & Son; Ira F. Blewitt and F. A. Warren, as State's Attorney of Moody County, South Dakota, appearing for the defendants Fred D. Henderson as Treas-
87 urer of Moody County, South Dakota, E. A. Hornby as Auditor of Moody County, South Dakota, and Moody County, South Dakota; Job Robinson the Defendants, Richards Trust Company, a corporation, and Iowa and Dakota Land Company, a corporation, having been duly served with a chancery subpoena heretofore issued in accordance with the rules of this Court, but having made no appearance and being now in default. The cause having been submitted to the Court for its decision upon an agreed statement of facts, duly signed by the Solicitors for the respective parties for whom appearances were entered, said statement having been filed herein on the 8th day of February, A. D. 1912, the Court having heard the arguments of counsel and being now fully advised in the premises; it appearing to the court that the land involved in said suit, to-wit: the West Half of the Southwest Quarter of Section Twenty-two (22), and the East Half of the Southeast Quarter of Section Twenty-one (21), in Township One Hundred Six (106) North, of Range Forty-nine (49) West, of the Fifth Principal Meridian, situate in the County of Moody, in the State of South Dakota, was on the 7th day of October, A. D. 1878, public land of the United States subject to entry under the homestead laws thereof; that on said

date one, Henry Taylor, a member of the Santee Sioux Tribe of Indians, who was born in the United States, was the head of a family, had arrived at the age of twenty-one years and had abandoned his tribal relations as such Indian, entered said land as his homestead under the authority of the Act of Congress approved March 3, 1875 (18 Stat., 420); that he resided upon and occupied said land under said Homestead laws until December 11, 1884, at which time he made
88 satisfactory proof to the Register and Receiver of the United States Land Office at Mitchell, Dakota Territory, and to the Commissioner of the General Land Office; that he had occupied and resided upon said land for a period of five years immediately prior to said last mentioned date, as required by said Homestead laws, and that he had made full payment of the fees to said Land Office; that he was a member of said Santee Sioux Tribe of Indians, the head of a family, over twenty-one years of age, and that he had abandoned his said tribal relations, and thereupon the final Receiver's Receipt was issued to him by the Receiver of said Land Office in accordance with the laws, rules and regulations of the General Land Office relating to such matters, dated December 11, 1884, which provided that said Henry Taylor would be entitled to a patent for said tract of land subject to a twenty year limitation clause; that said Henry Taylor, with his family, continued to reside upon said land until the 8th day of August, 1908; that on the 6th day of June, 1890, a patent for said tract of land was issued by the United States to said Henry Taylor granting the same to him subject to the following condition: "This patent is issued upon the express condition that the title hereby conveyed shall not be subject to alienation or encumbrance either by voluntary conveyance or by judgment, decree or order of any Court, or subject to taxation of any character, but shall remain inalienable and not subject to taxation for a period of twenty years from the date hereof, as provided by the Act of Congress approved January 18, 1881"; that said patent was recorded on said date in the General Land Office and in the office of the Register of Deeds of Moody County, South Dakota, August 13, 1908.

89 That on the 8th day of August, 1908, said Henry Taylor and his wife entered into an agreement with the defendant Peart, whereby they agreed to sell said land to Peart for $2400.00, Taylor to receive in exchange therefor from Peart other land in Moody County as part of the consideration, and Taylor and Peart exchanged possession of said lands in accordance with said contract. That on September 8, 1908, said Peart assigned said contract to the defendant Fletcher, and thereafter Taylor and his wife refused to convey the land

in accordance with said contract, and on the 21st of November, 1908, Fletcher instituted suit in the United States Circuit Court for this District to compel the specific performance of said contract by Taylor and his wife, and on the 30th of December, 1908, the decree of said Circuit Court was entered compelling specific performance of said contract by Taylor and his wife, and one, Spafford, was appointed to convey the same pursuant to said contract upon failure of the Taylors to convey the same. That on the 4th of February, 1909, said Spafford, acting under the authority of said decree, executed and delivered to the defendant Fletcher a deed purporting to grant and convey all of the estate of the Taylors in said premises to said Fletcher. That said deed was duly recorded in the office of the Register of Deeds of Moody County, February 10, 1909, in Book 29 at page 28, thereof; that on the 5th day of February, 1909, the defendant Fletcher executed and delivered a Warranty Deed conveying the premises to the defendant Louis Hemmer. That Louis Hemmer now claims to be the owner of said premises by virtue of said deed, and was in possession of the premises at the commencement of this suit.

90 That the defendants, Richards Trust Company and the Iowa and Dakota Land Company, corporations, claim some interest or estate in said property under certain Tax Deeds issued by the Treasurer of Moody County subsequent to the issuing of the foregoing patent to said Taylor, and E. A. Hornby as Auditor of said County and Fred Henderson as Treasurer thereof at the time of the commencement of this action claim and assert the right to levy and assess taxes against the same under and pursuant to the laws of South Dakota, and the defendants, Job Robinson, S. W. Ballard and L. W. Ballard, co-partners as Ballard & Son, claim some lien against the premises by virtue of a judgment, or judgments, obtained against the said Henry Taylor.

That by letter dated May 14, 1909, the Commissioner of Indian Affairs, by and with the approval of the Secretary of the Interior, decided and recommended that the Commissioner of the General Land Office be instructed to cancel the patent issued for said land to Henry Taylor under date of June 6, 1890, and to issue a patent to said Taylor under the provisions of an Act of Congress approved July 4, 1884 (23 Stat., 76-96), with a condition therein to the effect that the United States does and will hold said land for a period of twenty-five years in trust for the sole use and benefit of said Taylor, his widow and heirs, according to the laws of South Dakota; that at the

expiration of said period the United States would con-
91 vey the same to him, his widow and heirs in fee discharge of said trust and free of all charge and encumbrance whatsoever; and thereupon, pursuant to said letter, on the 10th day of June, A. D. 1909, such patent, with the condition aforesaid, was duly issued to said Taylor.

It further appearing to the Court that said patent of June 6, 1890, was improperly issued under the provisions of said Act of Congress of January 18, 1881; that said Henry Taylor was entitled to a patent under the provisions of the Act of July 4, 1884, Supra, subject to all of the provisions of said Act of Congress, and that for a period of twenty-five years from and after the final proof of the said Henry Taylor, to-wit: December 11, 1884, the fee title to said land was held by the complainant herein in trust for the sole use and benefit of said Henry Taylor, his widow and heirs, according to the laws of South Dakota, and that complainant is under obligations to said Taylor to convey the same to him by patent at the expiration of said period free of all charge or encumbrance whatsoever, and that the said Henry Taylor had no legal right or authority to sell or convey or enter into any contract for the sale or conveyance of said premises prior to the expiration of such period. That said land was not subject to taxation by Moody County, or any of the officers thereof during said period, and that none of the defendants could acquire any right, title, interest or estate in or lien upon said premises by contract, judgment or otherwise.

It is therefore Considered, Ordered Adjudged and Decreed:

1st; That the complainant is the owner of the fee title
92 to said land and holds the same in trust for the sole use and benefit of said Henry Taylor, or in case of his decease, his widow and heirs, according to the laws of South Dakota.

2nd: That the contract entered into by and between said Henry Taylor and Anna Taylor, his wife, and J. E. Peart, the assignment thereof to the defendant Fletcher, the decree of the United States Circuit Court in the case of William W. Fletcher, versus Henry Taylor and Anna Taylor, entered in the office of the Clerk of said Court December 30, 1908, decreeing the specific performance of said contract, and the deed executed by F. A. Spafford to the defendant Fletcher February 5, 1909, and recorded February 10, 1909, in Book 29 at page 28 thereof, the deed from the defendant Fletcher to the defendant Hemmer, purporting to convey said premises to the latter, and having been recorded February 8, 1909, in Book 30, at page

6 thereof (each of said instruments having been recorded in the office of the Register of Deeds of Moody County, South Dakota), and each and all of them are void and are hereby cancelled, vacated, set aside and held for naught.

3rd: That the Tax Deeds and all tax proceedings heretofore had by any of the officers of Moody County, South Dakota, with respect to said land, be, and the same are hereby, cancelled and held for naught, and that the judgments heretofore entered against said land in favor of the defendants S. W. Ballard and L. W. Ballard, co-partners as Ballard & Son, as well as any claim to said premises by the defendant Job Robinson, be, and are hereby, held and adjudged to be no lien against said premises.

93 4th: That the defendants, and each of them, and all persons claiming through or under them since the commencement of this suit, have no right, title, interest or estate in or lien upon said premises, and each and every one of them are hereby restrained and enjoined Forever from claiming or asserting any estate or interest in, title to, or claim or lien upon the said premises adverse to the complainant, and to the said Henry Taylor.

It is further Ordered and Adjudged, that the complainant have and recover of the defendants, Louis Hemmer, William W. Fletcher, J. E. Peart, J. A. Hornby, as Auditor of Moody County, South Dakota, Fred D. Henderson as Treasurer of Moody County, South Dakota, and Moody County, South Dakota, its costs and disbursements, to be hereafter taxed and entered by the Clerk.

Attest: By the Court:

Oliver S. Pendar,
Clerk.

JAMES D. ELLIOTT,
Judge.

By Odin R. Davis,
Deputy.

(Seal of Court)

Endorsed: Filed in the District Court on April 16, 1912.

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93 Assignment of Errors.

Come now Louis Hemmer, William W. Fletcher, J. E. Peart and Moody County, South Dakota, defendants, in the above entitled proceeding, and file the following assignment of errors upon which they and each of them will rely upon their appeal from the decree made by this Honorable Court, on the 16th day of April, 1912, in the above entitled cause.

I.

The United States Circuit Court for the District of South Dakota, erred in overruling the defendants' objection to the introduction in evidence of Exhibit "A", being a letter from the Acting Commissioner of Indian Affairs to the Secretary of the Interior, marked "Received May 14th, 1909."

II.

The said Court erred in holding and determining that the United States has such an interest in the real property in question as entitles it to maintain this suit in its own name.

III.

The said Court erred in holding and determining that the judgment and decree of this Court, filed December 30th,
96 1908, in the action entitled "William W. Fletcher, Complainant, vs. Henry Taylor and Anna Taylor, Defendants", is not binding and conclusive as against the United States of America, the complainant herein.

IV.

The said Court erred in holding and determining that the Act of Congress, approved July 4th, 1884, (23 Stat. 96) is amendatory of and supplemental to the Act of March 3rd, 1875, (18 Stat. 420) and applies to the same classes of persons.

V.

The said Court erred in holding and determining, under the facts disclosed in this record, that the Indian Henry Taylor, had not fully complied with the provisions of the said Act of March 3rd, 1875, prior to the time when the Act of July 4th, 1884, above referred to, became effective.

VI.

The said Court erred in that it failed to find and conclude that the said Henry Taylor had fully complied with all the provisions of the Act of March 3rd, 1875, and had acquired a vested right in, and was entitled to a patent, under the provisions of that law, prior to the enactment of the law of July 4th, 1884.

VII.

The said court erred in making and entering its judgment and decree herein, dated the 16th day of April, 1912, and entered in the office of the Clerk of said Court on the 16th day of April, 1912.

97 VIII.

The said Court erred in adjudging that the complainant, the United States of America, is the owner of the fee title to the land involved in this suit, and holds the same in trust for the sole use and benefit of said Henry Taylor or in case of his decease his widow and heirs, according to the laws of South Dakota.

IX.

The said Court erred in holding and adjudging that the contract entered into by and between said Henry Taylor and Anna Taylor, his wife, and J. E. Peart, the assignment thereof to the defendant Fletcher, the decree of the United States Circuit Court in the case of William W. Fletcher versus Henry Taylor and Anna Taylor, entered in the office of the Clerk of said Court December 30th, 1908, decreeing the specific performance of said contract, and the deed executed by F. A. Spafford to the defendant Fletcher February 5, 1909, and recorded February 10, 1909, in Book 29 at page 28 thereof, the deed from the defendant Fletcher to the defendant Hemmer, purporting to convey said premises to the latter, and having been recorded February 8, 1909, in book 30 at page 6 thereof (each of said instruments having been recorded in the office of the Register of Deeds of Moody County, South Dakota) each and all of them are void and are [cancelled], vacated, set aside and held for naught.

X.

The said Court erred in adjudging that the tax deeds and all tax proceedings of the officers of Moody County, South Dakota, with respect to said land, be [cancelled] and held for naught.

98 XI.

The Court erred in adjudging and decreeing that these defendants and each of them, and all persons claiming through or under them since the commencement of this suit have no right, title, interest, or estate in, or lien upon said premises, and that each of them is enjoined from claiming or asserting any such estate or interest in, or claim or lien upon said premises adverse to the complainant, and to the said Henry Taylor.

XII.

The Court erred in that it failed to find and adjudge that the contract entered into by and between said Henry Taylor and Anna Taylor, his wife, and J. E. Peart, the assignment thereof to the defendant Fletcher, the decree of the United

States Circuit Court in the case of William W. Fletcher versus Henry Taylor and Anna Taylor, entered in the office of the Clerk of said Court, December 30, 1908, decreeing the specific performance of said contract, and the deed executed by F. A. Spafford to the defendant Fletcher February 5, 1909, and recorded February 10, 1909, in Book 29 at page 28 thereof, the deed from the defendant Fletcher to the defendant Hemmer, purporting to convey said premises to the latter, and having been recorded February 8, 1909, in Book 30 at page 6 thereof (each of said instruments having been recorded in the office of the Register of Deeds of Moody County, South Dakota), each and all of them are valid and binding as against this complainant, the United States of America, and the said Henry Taylor, and that said Taylor and this complainant have no right, title or interest in, or lien or incumbrance upon the property
99 involved in this suit.

RICE & BENSON,
Solicitors for J. E. Peart, Louis Hemmer, William W. Fletcher.

FREDERICK A. WARREN,
State's Attorney of Moody County, Solicitor for Moody County, South Dakota.

Endorsed: Filed in the District Court on July 17, 1912.

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100 Petition for Appeal.

To the Honorable James D. Elliott, District Judge, and one of the Judges of the above named Court, presiding therein:

The above named defendants, J. E. Peart, Louis Hemmer, William W. Fletcher and Moody County, South Dakota, conceiving themselves aggrieved by the order and decree made and entered in the above entitled cause, on the 16th day of April, 1912, wherein and whereby among other things it was ordered, adjudged and decreed that the complainant, the United States of America, is the owner of the fee title to the land involved in said proceeding and holds the same in trust for the benefit of one Henry Taylor; that the contract between said Taylor and the defendant Peart, and the assignment thereof to the defendant Fletcher, and the decree of the United States Circuit Court, entered December 30th, 1908, decreeing the specific performance of said contract, and the deed executed in pursuance of said decree to the defendant Fletcher on February 5th, 1909, and the deed recorded
101 February 8th, 1909, conveying said premises from the defendant Fletcher to the defendant Hemmer, are each

and all of them void and are cancelled, vacated and set aside; and whereby it was further ordered, adjudged and decreed that the tax deeds and all tax proceedings heretofore had by any of the officers of Moody County, South Dakota, with respect to said land, are cancelled and held for naught; and whereby it was further ordered, adjudged and decreed that these defendants and appellants are restrained and enjoined forever from claiming or asserting any estate or interest in, or title to or claim or lien upon said premises adverse to the said Henry Taylor; do hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from said order and decree, for the reasons specified in the assignment of errors filed herein, and they pray that this, their petition for their said appeal, may be allowed and that a transcript of the records, papers and proceedings, upon which said order and decree was made, duly authenticated may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

RICE & BENSON,
Solicitors for J. E. Peart, Louis Hemmer and William W. Fletcher.

FREDERICK A. WARREN,
[States] Attorney, Solicitor for Moody County, South Dakota.

Endorsed: Filed in the District Court on July 17, 1912.

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103 Order Allowing Appeal.

On motion of F. A. Warren and Rice & Benson, Solicitors and of counsel for defendants, it is ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the final decree heretofore filed and entered, herein, be and the same hereby is allowed, and that a certified transcript of the record and proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals. It is further ordered that the bond on appeal be fixed at the sum of One Thousand Dollars, the same to act as a supersedeas bond, and also as a bond for costs and damages on appeal.

Dated this 17 day of June, 1912.

By the Court:

JAMES D. ELLIOTT,
Judge.

104 Endorsed: Filed in the District Court on July 17, 1912.

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105 **Supersedeas Bond.**

Know all men by these presents that we, J. E. Peart, Louis Hemmer, William W. Fletcher and Moody County, South Dakota, as principals and Richard L. Brown and A. O. Hove as sureties are held and firmly bound unto the United States of America in the penal sum of One Thousand ($1000) Dollars, lawful money of the United States for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally firmly by these presents:

Sealed with our seals, and dated this 1st day of July, 1912.

Whereas, lately at a Circuit Court of the United States, for the District of South Dakota, Southern Division, in a suit pending in said Court between the United States of America and the above named defendants, a final decree was rendered against these defendants, who have obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals to reverse said decree.

106 Now the condition of the above obligation is such that if the said J. E. Peart, Louis Hemmer, William W. Fletcher and Moody County, South Dakota, shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against them if they fail to make their plea good, then the above obligation shall be void; otherwise to remain in full force and virtue.

In Witness Whereof, We have hereunto set our hands and seals this 1st day of July, A. D. 1912.

(Seal) J. E. PEART
(Seal) WILLIAM W. FLETCHER,
(Seal) LOUIS HEMMER,
(Seal) By Rice & Benson,
Their Solicitors.
MOODY COUNTY, SOUTH DAKOTA,
By its [States] Attorney,
(Seal) Frederick A. Warren.
(Seal) RICHARD L. BROWN,
(Seal) A. O. HOVE,

State of South Dakota,
County of Moody—ss.

On this 7th day of July, A. D. 1912, before me, C. C. Shoemaker, a Notary Public within and for said County and State, personally appeared A. O. Hove and R. L. Brown, to me per-

sonally known to be the same persons who are described in and who executed the above and foregoing undertaking, and each severally duly acknowledged to me that they executed the same.

(Notarial Seal) C. C. SHOEMAKER,
Notary Public.

107 State of South Dakota,
County of Moody—ss.

On this 8th day of July, A. D. 1912, before me, C. C. Shoemaker, a Notary Public within and for said County and State, personally appeared Lewis Benson, known to me to be the person whose name is subscribed to the within instrument as the Solicitor for J. E. Peart, Wm. W. Fletcher and Louis Hemmer, and acknowledged to me that he subscribed the name of said J. E. Peart, Wm. W. Fletcher and Louis Hemmer thereto as Principal and his own name as Solicitor for said parties.

(Notarial Seal) C. C. SHOEMAKER,
Notary Public.

State of South Dakota.
County of Moody—ss.

On this 8th day of July, A. D. 1912, before me, C. C. Shoemaker, a Notary Public, within and for said County and State, personally appeared F. A. Warren, known to me to be the person whose name is subscribed to the within instrument as the Solicitor for Moody County, and acknowledged to me that he subscribed the name of the said Moody County thereto as Principal and his own name as Solicitor for said party.

(Notarial Seal) C. C. SHOEMAKER,
Notary Public.

108 State of South Dakota,
County of Moody—ss.

Richard L. Brown, being first duly sworn, says that he is a resident and freeholder of the County of Moody, in this State, and that he is worth the sum of One Thousand Dollars, over and above all his debts and liabilities, and exclusive of all property exempt from levy and sale on execution, and is the owner of the following described real property, in the State of South Dakota, free and clear of all incumbrances. North East Quarter of Section Eight and the North West Quarter

of Section Nine all in Township One Hundred Six, Range Forty-eight Moody County, S. D.

RICHARD L. BROWN.

Subscribed and sworn to before me, this 1st day of July, A. D., 1912.

(Notarial Seal) C. C. SHOEMAKER,
Notary Public, South Dakota.

State of South Dakota,
County of Moody—ss.

A. O. Hove, being first duly sworn, says that he is a resident and freeholder of the County of Moody, in this State, and that he is worth the sum of One Thousand Dollars, over and above all his debts and liabilities, and exclusive of all property exempt from levy and sale on execution, and is the owner of the following described real property, in the State of South Dakota, free and clear of all incumbrances. North one half of Section One, Township One Hundred Eight,
109 Range Fifty-one West of the 5th P. M.

A. O. HOVE.

Subscribed and sworn to before me, this 1st day of July, A. D., 1912.

(Notarial Seal) C. C. SHOEMAKER,
Notary Public, South Dakota.

Whereas, on the 28th day of July, 1909, an action was commenced by the United States of America, Complainants, against Louis Hemmer, Moody County, South Dakota, and others, defendants, in the Circuit Court of the United States for the District of South Dakota, and whereas, said action proceeded to trial and judgment was rendered by said Court in favor of the plaintiff and against said County, defendant, and other defendants, on the 16 day of April, 1912, and we, the Board of County Commissioners of said County and State, feeling that the County is aggrieved by said judgment and deeming it to be to the best interest of said County to appeal therefrom to the United States Circuit Court of Appeals, and having instructed Frederick A. Warren, the [States] Attorney for said County to perfect such appeal, and

Whereas, said Frederick A. Warren, as such attorney, did on the 2nd day of July, 1912, sign and execute for and in the name of said Moody County, by Frederick A. Warren, [States] Attorney, the supersedeas bond necessary for such appeal in said manner,

Therefore, Frederick A. Warren, the [States] Attorney of Moody County, South Dakota, is hereby authorized to
110 execute and sign for and in the name of said county such supersedeas bond or bonds necessary to perfect such appeal, and the act of the said Frederick A. Warren in signing and executing said bond is in all respects ratified and confirmed and made the act of the County.

Done at the regular July meeting of the Board of County Commissioners of Moody County, South Dakota, this 8th day of July, 1912; by said Board.

B. E. NACE, Chairman.
G. E. PETTIGREW,
O. C. OLSON,
Board of County Commissioners.

(Seal)
Attest: Edgar A. Hornby,
County Auditor, Moody County, South Dakota.

State of South Dakota,
County of Moody—ss.

I, Edgar A. Hornby, Auditor of Moody County, South Dakota, and Clerk of the Board of the County Commissioners, do hereby certify that I have compared the annexed Resolution with the original on file in the office of the County Auditor aforesaid, and that the same is a true copy thereof, and of the whole of said original Resolution.

In Testimony Whereof, I have hereunto affixed the seal of the County Auditor of said Moody County State of South Dakota, and signed my name, this 8th day of July, A. D. 1912.

EDGAR A. HORNBY,
County Auditor of Moody County,
State of South Dakota.
By L. E. Buck, Deputy Auditor.

Approved this 17" day of July, A. D. 1912.
By the Court:

JAMES D. ELLIOTT,
District Judge.

111 Endorsed: Filed in the District Court on July 17, 1912.

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112 (Stipulation as to Answers filed by Defendants, Hemmer, et al., and as to Transcript on Appeal.)

It is hereby stipulated and agreed by and between the United States of America, Complainants and Respondents, and Louis

Hemmer, William W. Fletcher, J. E. Peart and Moody County, South Dakota, Defendants and Appellants; that the answers filed by the defendants, Hemmer, Fletcher, Peart, Henderson and Hornby, and upon which this action was tried, are substantially identical with the answer filed by the defendant Moody County hereinafter designated to be printed; that the defendants S. W. Ballard and L. W. Ballard filed an answer disclaiming any interest in the subject matter of this suit; that none of the remaining defendants appeared or answered, although each and all of them were duly served with process. It is further stipulated that the following shall constitute the record in this case on appeal to the U. S. Circuit Court of Appeals, omitting in the printed record, wherever the rules of said Court permit it to be done, all titles, clerk's certificates, endorsements, etc.:

113 1. The Bill of Complaint.

2. Answer of the Defendants Moody County, Fred D. Henderson, as Treasurer of Moody County, S. D., and E. A. Hornby, as Auditor of Moody County, S. D.

3. Replication.

4. Agreed statement of facts with the following exhibits thereto attached:

(a) Homestead declaration.
(b) Register's receipt.
(c) Homestead application.
(d) Homestead affidavit.
(e) Homestead affidavit. (Hopkins & Robertson)
(f) Henry Taylor's Affidavit of August 2nd, 1887.
(g) Notice of filing proof.
(h) Register's receipt.
(i) Final affidavit.
(j) Non-mineral affidavit.
(k) Testimony of claimant.
(l) Testimony of witnesses.
(m) Receiver's receipt.
(n) Letter to Secretary of Interior from Acting Commissioner.
(o) Register's final certificate.
(p) Deed from Dr. Spafford.
(q) Deed from Fletcher to Hemmer.
(r) Exhibit G. (Patent of June 10th, 1909)
(s) Exhibit H-1 (Letter from Commissioner to Jordan & Warren).

(t) Exhibit H-2 (Letter from Commissioner to Agent Indian Rights Association.)

(u) Exhibit H-3 (Letter from Commissioner to Superintendent at Flandreau.)

(v) Exhibit H-4 (Letter from Commissioner to Senator Gamble)

(w) Exhibit 1. (Deed from Peart to Anna Taylor).

5. That portion of the opinion of Honorable J. D. Elliott, District Judge, beginning with the following language
114 on page 1.), and including the remainder of said opinion, "From the above and foregoing statement of facts it becomes apparent that the following questions are involved within the issues here presented for determination."

6. The decree in this cause.

7. Petition for Appeal.

8. Order allowing Appeal.

9. Undertaking on Appeal.

10. Citation.

11. Assignment of Errors.

12. This Stipulation.

13. Clerk's Certificate.

14. Index.

Dated this 18 day of July, 1912.

EDWARD E. WAGNER,
U. S. Atty. for Complainant,

RICE & BENSON,
Solicitors for Louis Hemmer, J. E. Peart & William W. Fletcher.

FREDERICK A. WARREN,
[States] Attorney of Moody County, S. D., Solicitor for Moody County, F. D. Henderson and Edgar A. Hornby.

Endorsed: Filed in the District Court on July 23, 1912.

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116 (Opinion of the District Court.)

Edward E. Wagner, United States District Attorney, for complainant,

Rice & Benson, for defendants Peart, Hemmer and Fletcher

Frederick A. Warren, State's Attorney, for Moody County, Henderson and Hornby.

Elliott, District Judge.

This action was brought by the United States of America, Complainant, against the defendants above named, by the United States District Attorney for the District of South Dakota, pursuant to instructions of the Attorney General of the United States.

The complainant states its cause of action in its complaint filed herein, in substance, after the formal portions, as follows:

It is alleged that Henry H. Taylor, sometimes known and designated Henry Taylor, was and during all the times named in the complaint was a Sioux Indian of the full blood belonging to and a member of the Santee Sioux band of Indians.

117 That on or about October 7, 1878, in pursuance of authority conferred by an Act of Congress approved March 3, 1875, Chap. 131 (18 Stat. L. 420), he made application to enter and entered the West Half of the Southwest Quarter of section 22, and the East Half of the Southeast Quarter of Section 21, in township 106, range 49, west of the 5th Principal Meridian, in Moody County, South Dakota, under an Act of Congress entitled "An Act to Secure Homesteads to Actual Settlers on the Public Domain", approved May 20, 1862, and acts amendatory thereof, by making satisfactory proof under the rules prescribed by the Secretary of the Interior, to the officers of the United States Land Office located at Sioux Falls, South Dakota, then Territory of Dakota, that he, said Henry H. Taylor, was an Indian born in the United States, was the head of a family, was twenty one years old, and had abandoned his tribal relations as such Indian.

That the application and affidavits filed by said Taylor in said United States Land Office and subsequently filed in the General Land Office of the United States, contained, among other things "That I am an Indian, formerly of the Santee Sioux tribe, that I have abandoned my tribal relations with said tribe, and adopt the habits of civilized life."

That the application of said Taylor was designated as an Indian homestead application, and the Receiver's receipt issued by the Receiver of said Land Office was endorsed and designated "Indian Homestead", as well as the final certificate issued by the Receiver of the United States Land Office at Mitchell, Dakota Territory, dated December 11, 1884.

That Taylor resided upon and occupied said premises as his homestead and made satisfactory proof to the officers of the United States Land Office in charge of the Land Office
118 at Mitchell, as well as the General Land Office at Washington, of his occupancy and residence upon said land for a period of five years, and in pursuance of his homestead entry thereon made full payment for said land and received his final Receiver's certificate December 11, 1884, wherein it was designated that the patent to be issued to said Taylor for said homestead entry was and should be subject to all the [restrain-s] and restrictions upon alienation of said land as provided by said Act of March 3, 1875, as well as the Act of Congress approved July 4, 1884, Chap. 180 (23 Stat. L. 96).

That said Taylor continued to reside upon said land with his family and occupy the same as his homestead until about April 28, 1909, when he and his family were forcibly removed therefrom by the defendant, Louis Hemmer, who removed or caused said Taylor and his family to be removed from said premises by force and violence, and who has by such means wrongfully deprived said Taylor of the possession of said premises at all times since.

That while said Taylor, with his family, resided upon and occupied said real property in the manner above stated, and about August 8, 1908, he and his wife, Anna Taylor, entered into an agreement or contract for deed with the defendant J. E. Peart, whereby said Taylor and his said wife, agreed to sell and convey said real property above described to the defendant, Peart, for a valuable consideration.

That said contract for deed was filed for record and recorded in the office of the Register of Deeds of Moody County, South Dakota, August 29, 1908.

119 And thereafter, on or about September 8, 1908, the defendant Peart Assigned said contract to the defendant, William W. Fletcher, which assignment was in writing and was filed for record in the office of said Register of Deeds on the 11th day of September, 1909, and duly recorded in said office.

That thereafter, about November 21, 1908, said Taylor, and his wife, having refused to sell and convey said real property to said Fletcher, in accordance with said contract, said Fletcher caused a suit to be instituted in this Court against said Taylor and wife to compel the specific performance of said contract to convey said real property by said Taylor and his wife, and on the 30th day of December, 1908, a decree of this Court

was entered in said suit, a copy of which is set forth in the complaint. In substance said judgment in said action wherein William W. Fletcher was complainant and Henry Taylor and Anna Taylor were defendants, finds the execution of the said contract by Taylor and wife to Peart, and the assignment to Fletcher, and decrees the specific performance thereof, and further provides that if the said Henry Taylor and Anna Taylor, the defendants, refuse to execute and deliver a deed to said William W. Fletcher, conveying said premises within thirty days from the date of said decree, which was the 30th day of December, A. D. 1908, F. A. Spafford of Flandreau, South Dakota, was thereby appointed Master, to execute and deliver to the said Fletcher a deed of conveyance to said premises, and the decree provided that such deed should in all respects be of the same force and effect as if made, executed and delivered by the said Henry Taylor and Anna Taylor, his wife.

120 It is further alleged that, pursuant to said decree, a deed was executed by said Spafford to the defendant Fletcher, purporting to convey the said real property to said Fletcher, and on the 5th day of February, 1909, the defendant Fletcher executed and delivered a deed to said property to said Hemmer, both of which deeds were recorded in the office of the Register of Deeds of said county.

It is therefore alleged that the defendant, Hemmer, claims under this deed an estate in or right to the possession of said real property by virtue of said deed from Fletcher to him, and that he deprives said Taylor of the possession of this land by virtue thereof.

It is further alleged, in substance, that although the said Indian entered this land as a homestead under and pursuant to the Act of March 3, 1875, that he made his final proof and payment for said land under the requirements promulgated by the Secretary of the Interior, subsequent to July 4, 1884, and that he was entitled to receive from the United States or its duly authorized officers and agents, a patent for said land, in accordance with the provisions of said Act of July 4, 1884, which contains a provision that the United States will hold the land for a period of twenty-five years in trust for the sole use and benefit of the Indian, etc.

It is further alleged that although said Taylor was entitled to a patent under said Act of Congress, containing this 25 year non-alienation provision, there was issued to him by mistake, a patent purporting to have been issued under the Act of Congress approved June 18, 1881, and the patent contained the pro-

vision "This patent is issued upon the express condition
121 that the title hereby conveyed shall not be subject to alienation or incumbrance, whether by voluntary conveyance or by judgment, or the decree of any Court, or subject to taxation of any character, and shall remain inalienable and not subject to taxation for a period of twenty years from the date thereof, as provided by the Act of Congress approved June 18, 1881."

It is further alleged that such patent was issued without authority of law and by mistake, and that said Act of Congress approved June 18, 1881, was enacted for the sole use and benefit of the Winnebago Indians of Nebraska and Wisconsin, and that the said Taylor was not a Winnebago Indian of Nebraska or Wisconsin, and that the said Taylor was a Santee Indian of the Sioux tribe as above stated and was not entitled to the provisions of said Act of Congress of June 18, 1881.

It is further alleged that when said patent was issued as above stated, as a matter of fact he was entitled to receive a patent to the effect that the United States would hold said land for the use and benefit of said Taylor or his widow and heirs, in trust, for a period of twenty-five years, and not otherwise, under the provisions of the Act of 1884.

It is further alleged that although said Taylor was entitled to such patent, none was issued to him until the 10th day of June, A. D. 1909, on which date the President of the United States caused to be issued to the said Taylor a patent, set forth in the complaint, which was a patent issued in accordance with the provisions of the Act of Congress of July 4, 1884, and contained a provision that the United States does and will hold the land above described for the period of twenty-five
122 years, in trust, for the sole use and benefit of said Henry Taylor, or in case of his decease, of his widow and heirs, according to the laws of the state where such land is located, and at the expiration of said period the United States will convey the same by patent to the said Henry Taylor, or his widow and heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever—

It is further alleged that as a matter of fact that at all times since the homestead entry of the said Taylor upon the land above described, the United States has held said land in trust for the sole use and benefit of said Taylor and that it now holds the same for him in trust for his sole use and benefit, and that the obligation rests upon this plaintiff, by virtue of said act of July 4, 1884, to convey the same by patent to him, or his widow and heirs in fee, discharged of said

trust, and free of all incumbrances whatsoever, for twenty-five years after the date of the last mentioned patent, to-wit: June 10, 1909.

It is further alleged that when the said Taylor and wife entered into the contract for deed with the defendant Peart, said land was held by the United States in trust as aforesaid, and that said Taylor and his wife had no authority or power to contract for the delivery of a deed or the conveyance of said land, or to alienate the same in any manner whatsoever, and that the defendants could not lawfully acquire any right, title or interest whatsoever in said real property by virtue of the assignment of said contract purporting to convey said land nor by the decree of the Court above referred to herein,
wherein the said Fletcher was plaintiff and the said
123 Taylor and wife were defendants, and to which action this plaintiff was not made a party, further alleging that neither the Secretary of the Interior or any other officer of the United States have ever approved or ratified any sale or conveyance of said premises.

It is further alleged in substance that notwithstanding said premises have been held in trust by the United States for the use and benefit of said Indian, that the defendant Henderson, as treasurer of said Moody County, South Dakota, and Hornby as Auditor of said county, in their official capacity, as well as the County of Moody, have attempted to cause said land to be assessed and taxes levied and caused to be levied against the said land, listing said property for sale for the non payment of taxes so assessed and levied, and said county as well as said officers now threaten to levy and collect taxes thereon by sale of said property, notwithstanding the title thereof is held by the United States as aforesaid, and that said land has at all times been and is now exempt from taxation.

It is further alleged that defendant Robinson claims some interest or estate in said land by virtue of a certain Treasurer's tax deed issued by the treasurer of said county of Moody to one Fred L. Rice, who conveyed or attempted to convey the same to said Job Robinson, and he thereby claims to have acquired an estate therein by virtue of said tax deed.

It is further alleged that the defendants Iowa and Dakota Land Company, and the defendant Richards Trust Company each claim some estate in or right to said land by virtue of
treasurer's tax deeds heretofore executed by the treas-
124 urer of Moody County, for unpaid taxes assessed upon said premises.

The complainant further alleges that all of said deeds and the decree of the Court entered as above set forth, are each and all of them clouds upon the title to said land, and that each and all of said defendants claim some right, interest or estate therein by virtue thereof.

It is thereupon further alleged that in May, 1908, there was filed and docketed in the office of the Clerk of the Circuit Court within and for Moody County, South Dakota, a judgment in favor of the defendants S. W. Ballard and L. W. Ballard, co-partners as Ballard & Son, amounting to $198.85, by virtue of which a lien is claimed upon said real property, which is also a cloud upon the title thereof.

It is further alleged that this is a suit in equity brought against each and all of the said defendants for the purpose of removing the clouds from said title and cancelling each and all of said instruments, to avoid a multiplicity of suits and actions at law for the purpose of protecting said land for the use and benefit of said Taylor, and in the execution and discharge of the trust reposed in the United States, by the laws of the United States.

Complainant thereupon asks that each and all of the instruments above referred to, as well as the decree of this Court above named, be cancelled, vacated and set aside and held for naught; that the judgment of the defendants Ballard & Son be adjudged to be no lien against the said real property and that each and all of the defendants be decreed to have no estate, right, title or interest in or lien upon said real property, and that each and all of them be en-
125 joined and forever estopped from claiming any estate, right, title or interest therein, and that the defendant, Moody County, as well as the treasurer and auditor thereof, and all of its officers be enjoined from levying, assessing or collecting taxes on or against the said real property and that the same be decreed not subject to taxation by said county or any of its officers, and for such other and further relief as equity may require.

To this complaint, the defendant, S. W. Ballard and L. W. Ballard, co-partners as Ballard & Son, filed a disclaimer and prayed leave to be dismissed.

An appearance was made and an answer filed in behalf of the defendants Moody County, South Dakota, Henderson, as treasurer, and Hornby as auditor, alleging in substance that the land described in the complaint had been, under the circumstances set forth in the complaint, the homestead of said Taylor, and that he had received his final receipt from the proper officer of the Land Office, upon making his final [proor]

thereon, dated the 11th day of December, 1884, and alleging that by reason of the facts set forth, substantially as stated in the complaint herein, that said Henry Taylor was then and there entitled to a patent from the United States conveying to him in fee the premises above described, subject only to the restrictions and limitations contained in the 15th section of the Act of Congress of March 3, 1875, in re-
126 gard to alienation and incumbrance, such restrictions being set forth therein. It then alleges that the patent that was issued was by mistake issued under the provisions of the law of 1881, with a non-alienation clause of 20 years from the date of said patent, whereas the only restriction which properly should have been inserted in said patent was that contained in the Act of March 3, 1875, limiting the period of alienation and incumbrance to five years after the date of such patent. It further sets forth the issuance of patent dated the 10th day of June, 1909, by the United States to said Henry Taylor, under the provisions of the Act of July 4, 1884, fixing the period of non-alienation at twenty five years as therein provided.

It thereupon further states that when this Act of July 4, 1884, was passed that the said Henry Taylor had lived upon the said homestead more than the period or full term of five years, entitling him to make proof and receive final patent under the provisions of the Act of March 3, 1875, alleging that as he had completed his residence and earned a patent thereto prior to the Act of July 4, 1884, and as full citizenship had been conferred upon him and as the United States had previously granted the said premises to the said Henry Taylor, the said patent was issued without any authority of law and is null and void. These defendants demanded a dismissal of complainant's bill of complaint herein.

The defendants Louis Hemmer, William W. Fletcher and J. E. Peart also appeared and answered, setting up in substance the answer filed by their co-defendants, above referred to.
127 The action is brought on for trial before this Court by stipulation upon the following agreed

Statement of Facts.

1st.

That Henry H. Taylor is a fullblood Sioux Indian and a member of the Santee Sioux Band of Indians, and is not now a member of the Winnebago Band of Indians and never had any connection with said Winnebago Band of Indians.

2nd.

That on the 7th day of October, 1878, said Henry H. Taylor, under the name of Henry Taylor, made homestead application #10,666 at the United States Land Office at Sioux Falls, Dakota Territory, to enter, and did enter as a homestead the following described real property, situate in Moody County, then Territory of Dakota, now State of South Dakota, to-wit: The West Half of the Southwest Quarter of Section twenty-two (22) and the East Half of the Southeast Quarter of Section twenty-one (21) in Township one hundred and six (106) North of Range forty-nine (49) West of the fifth Principal Meridian, containing 160 acres of land according to the United States government survey thereof, said land being then a part of the public domain and subject to entry under the homestead laws of the United States then in force.

3rd.

That said Taylor was at said time an Indian born in the United States, was the head of a family and was over the age of twenty-one years and had abandoned his tribal relations as such Indian.

128 4th.

That immediately after making such homestead entry said Taylor entered upon said land and established a residence thereon and resided thereon for a period of five years and made satisfactory proof of all of the aforesaid facts to the Commissioner of the General Land Office.

That the bundle of papers hereto annexed marked Exhibit A, consisting of homestead application, affidavits, receipts, final proof, affidavit of publication and non-mineral affidavit are true copies of the original papers filed in connection with said homestead entry and are hereby made a part of this agreed statement of facts.

(Paragraph 5th is omitted as it refers to photographic copy of letter.)

6th.

That on the 6th day of June, A. D. 1890, a patent for said land was issued to the said Henry Taylor, of which the following, marked Exhibit B, is a true copy:

The United States of America: To all to whom these presents shall come,—Greeting:

Homestead Certificate No. 5414

Application 10666.

Whereas, There has been deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Mitchell, Dakota, Territory, whereby it appears that pursuant to the Act of Congress approved 20th May 1862.

"To secure homesteads to actual settlers on the public Domain and the Act supplemental thereto the claims of Henry Taylor has been established and duly consummated in conformity to law, for the West half of the Southwest Quarter of Section Twenty-two and the East Half of the Southeast
129 Quarter of Section twenty-one, in Township one hundred and six, North of Range forty-nine West, of the Fifth Principal Meridian, in Dakota Territory, containing One Hundred and Sixty acres according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General.

Now know ye, That there is therefore granted by the United States unto the said Henry Taylor the tracts of land above described: To have and to hold the said tract of land with the appurtenances thereof unto the said Henry Taylor and to his heirs and assigns forever. Subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes and rights to ditches and reservoirs, used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted as provided by law.

This patent is issued upon the express condition that the title hereby conveyed shall not be subject to alienation or incumbrance either by voluntary conveyance, or by judgment, decree or order of any Court, or subject to taxation of any character, but shall remain inalienable and not subject to taxation for the period of twenty years from the date hereof, as provided by Act of Congress approved January 18, 1881.

In Testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent and seal of the General Land Office to be
130 hereunto affixed.

Given under my hand at the city of Washington the sixth day of June, in the year of our Lord One Thousand

Eight Hundred and Ninety, and of the Independence of the United States and the One Hundred and fourteenth.

(UNITED STATES)

By the President, Benjamin Harrison
By M. McKean, Secretary.
Res. Vol. 9, Pages 313 to 314
I. R. Convell, Recorded of the General Land Office

Ad interim."

That said patent was recorded in the office of the Register of Deeds for Moody county, South Dakota, August 13, 1908, in Book 20 at page 463 thereof.

7th.

That said Taylor continued to own and occupy said land with his family and on the 8th day of August, A. D. 1908, he and his wife made a contract with one J. E. Peart, of which the following, marked Exhibit C, is a true copy:

"This Agreement, Made and entered into this 8th day of August, A. D. 1908, by and between Henry Taylor and his wife, Anna Taylor, parties of the first part, and J. E. Peart, party of the second part:

Witnesseth: That if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on his part to be made and performed, the said parties of the first part hereby covenant and agree to convey and assure to the said party of the second part, in fee simple, clear of all incumbrances whatsoever, by a good and sufficient Warranty Deed and clear abstract, the lots, piece or parcel of ground, situate in the County of Moody and State of
131 South Dakota, known and described as follows: The West half of the South West Quarter (W½ SW¼) of Section Twenty-two (22) and the East half of the South East Quarter (E½ SE¼) of Section twenty-one (21), Township One Hundred six (106), North of Range Forth-nine (49), West of the 5th P. M., in Moody County, State of South Dakota. And the said party of the second part, hereby covenants and agrees to pay to said party of the first part the sum of Twenty-four Hundred Dollars, in the manner following, payable at the office of Jordan & Warren at Flandreau, South Dakota; Parties of the first part shall accept Lot 1 of the N. W. ¼ of Sec. 21, 107-48, Moody County, South Dakota, at a consideration of $550.00 as payment of the within described land.

The party of the second part shall keep out the sum of $800.00 of the purchase price until the S. E. ¼ of the S. E. ¼

of Sec. 21-106-49, shall have been probated and good and clear abstract shall have been furnished to turn over said $800.00 the Bal. to be paid in cash upon the furnishing of a clear abstract and warranty deed within 30 days from date hereof.

It is Mutually Agreed, By and between the parties hereto, that the time of payment shall be an essential part of this contract; and that all the covenants and agreements herein contained shall extent to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties.

In Testimony Whereof, Both parties have hereunto set their hands and seals the day and year hereinbefore written.

(Seal) HENRY TAYLOR
(Seal) ANNA TAYLOR
(Seal) J. E. PEART

Signed, Sealed and
delivered in presence of
Zenas Graham,
F. A. Warren.

132 State of South Dakota,
County of Moody—ss.

On this 8th day of August, in the year One Thousand Nine Hundred and Eight, before me, F. A. Warren, a Notary Public in and for said County and State, personally appeared Henry Taylor, Anna Taylor and J. E. Peart, known to me to be the persons who are described in and who executed the foregoing and within instrument, and acknowledged to me that they executed the same.

F. A. WARREN,
Not. Pub. Moody County, So. Dak."

Said contract was acknowledged and was recorded in the office of the Register of Deeds for Moody County, South Dakota, August 29, 1908, in Book 24 at page 606.

8th.

That the said J. E. Peart, on or about September 8, 1908, assigned said contract to the defendant William W. Fletcher; that said assignment was in writing and was filed for record September 11, 1908, at ten o'clock A. M. ,and recorded in the office of the Register of Deeds for said county of Moody in Book 24 at page 608.

That after the execution of the said contract between the said J. E. Peart and Henry H. Taylor and wife, set out above, the said Taylor and his family took possession of said

Lot one of the Northwest Quarter of Section twenty-one (21) in Township one Hundred Seven (107), Range forty-eight (48), described in said contract, and has since resided thereon, and the said Peart took possession of the West half of the Southwest Quarter of Section twenty-two (22) and the
133 East Half of the Southeast Quarter of Section twenty-one (21) in Township one hundred six (106) North, of Range forty-nine (49).

9th.

That after making said contract, as aforesaid, the said Taylor and his wife refused to sell and convey his said homestead described in said contract to the said Peart or Fletcher, and on the 21st day of November, 1908, said Fletcher instituted a suit against said Taylor and his wife in the United States Circuit Court for the District of South Dakota to compel the specific performance of said contract, and the original files in said suit are hereby referred to and adopted and made a part of this statement as Exhibit D, and copies thereof may be hereto attached and marked Exhibit D and submitted in lieu of the original.

10th.

That thereafter, on the 4th day of February, 1909, F. A. Spafford of Flandreau, South Dakota, who was appointed Master to execute such deed, in the decree in said suit, executed and delivered to the defendant William W. Fletcher, a deed, a copy of which is hereto annexed, marked Exhibit E. Said deed was acknowledged and filed for record and recorded in the office of the Register of Deeds for Moody county, South Dakota, February 10, 1909, in Book 29 at page 28; and on the 5th day of February, A. D. 1909, the said William W. Fletcher, executed and delivered to the defendant Louis Hemmer a Warranty Deed, a copy of which is hereto annexed marked Exhibit F, which deed was acknowledged and filed for record and recorded in the office of the Register of Deeds of said county February 8, 1909, in Book 30 at page 6, and the said defendant Hem-
134 mer claims to be the owner of said premises by virtue of said deed, and is and was, at the commencement of this suit, in possession of said premises.

11th.

That before the commencement of the suit between Fletcher and Taylor, referred to above, and after the execution of the agreement between Peart and Taylor, set out above, the defendant Peart signed, acknowledged and delivered to Jordan

& Warren, who were acting as the attorneys for Taylor in said transaction a deed, Exhibit I attached, and in addition thereto the said Peart left with said Jordan & Warren, the balance of the purchase price under said contract, amounting to about $1000.00, and that when Taylor was notified that the said deed and money had been left with the said Jordan & Warren he refused to receive the same, and that he has at all times since refused to receive said deed or any deed for said land, and has refused to receive said money; and thereafter, about the month of April, 1909, he attempted to remove with his family back to the said homestead property and was denied the possession thereof by the defendant Hemmer, who then claimed the same under the deed from Fletcher, referred to above, and who has at all times since denied Taylor the possession of said premises, or any part thereof.

12th.

That on the 10th day of June, A. D. 1909, the President of the United States caused to be issued and delivered to the said Taylor a patent for said land, a copy of which is hereto annexed marked Exhibit G, and the United States now claims to hold the title of said land in trust for the said Taylor.

135 The letters hereto annexed marked Exhibit H, consisting of a letter dated November 21st, 1907, from the Acting Commissioner of Indian Affairs to Jordan & Warren; a letter dated March 16th, 1907, from Larrabee, Acting Commissioner of Indian Affairs to S. M. Brosius; a letter dated June 24th, 1907 from Larrabee, Acting Commissioner to the Superintendent of Riggs Institute; a letter dated March 9, 1907, from Larrabee, Acting Commissioner of Indian Affairs, to Honorable Robert J. Gamble, are made a part of this statement, to be considered as such subject to the objection on the part of the complainant that the same are incompetent and have no binding effect on the complainant in this suit. That the defendant Peart had said letters in his possession before entering into the contract above set out with Taylor, and claims to have relied thereon in making said contract.

13th.

That in 1894 the County Treasurer of Moody County and the Auditor of said County, and the Board of County Commissioners thereof assessed said land for taxation and levied taxes thereon, and they have assessed the same for taxation and levied taxes thereon each and every year since 1894, and have caused the land to be sold for taxes, and at the time of the commencement of this suit and at all times since they have claimed

and asserted the right to assess said land for taxation and to levy taxes against the same, and do now claim such right.

From the above and foregoing statement of facts, it becomes apparent that the following questions are involved within the issues here presented for determination:

136 1. Under the facts stipulated in this case, has the United States such an interest in the real property in question as entitles it to maintain this suit in its own name?

This must be answered in the affirmative. This right has been opposed in the Courts of the United States upon various grounds, but it is now well settled that the United States, by virtue of its peculiar relationship to the Indians and to prevent the policy of the Government, to be worked out through legislation, being defeated, may enforce restrictions of the alienation of real estate in the Courts, in its own name, in order to effect its public policy.

U. S. vs. Allen, 179 Fed. 13, 103 C. C. A. 1.
Bowling vs. U. S. 191 Fed. 19.
U. S. et al. vs. Boyd et al. 68 Fed. 577.

2. What is the effect of the patent to the premises in question issued to Taylor on the 6th of June, 1890, purporting to be issued pursuant to an Act of Congress approved June 18, 1881?

In the determination of this issue it must be remembered that under the agreed statement of facts Taylor was an Indian having the qualifications named in the Act of March 3, 1875, filed upon the land in question, on the 7th day of October, 1878, made his final proof on the 11th day of December, 1884, and upon such proof patent was issued to Taylor on June 6, 1890, under the provisions of the Act of Congress of June 18, 1881, which it is conceded by all of the parties to this suit related exclusively to the Winnebago Indians, and contained a provision against the alienation of the land for a period of
137 twenty years from the date of the patent, and therefore had no relation to the rights of this Indian, Taylor, to whom this patent was issued. Under no possible theory can this law relating to the Winnebago Indians alone be relevant to the rights of the Indian Taylor to whom the patent was issued, or of the defendants in this action.

The limitation in the patent inserted under the provisions of that statute are void.

U. S. vs. Saunders, 96 Fed. 268

Frazee vs. Spokane Co. 69 Pac. 779.

Even though the patent in this case had failed to show that Taylor was an Indian, and contained no limitation what ever upon alienation, the act of the executive officers of the United States issuing the patent without condition or limitation (if limitation should have been imposed upon alienation under the then existing provisions of the Act of Congress) could not affect such limitation prescribed by Congress, and the purchasers from Taylor, the Indian, were chargeable with knowledge of the limitations imposed upon his title by the Acts of Congress.

Taylor vs. Brown, 5 Dak. 335

40 N. W. 525

147 U. S. 640

Eels vs. Ross, 64 Fed. 417

The rule of caveat emptor applies to these defendants taking this contract, assignment of the contract, judgment and tax liens.

They are charged with notice not only of all the facts appearing on the face of the patent, but were also bound by actual as well as constructive knowledge and notice of any
138 defect or mistake in the patent, which was obvious or which might have been known by proper diligence.

Wissler vs. Craig's Admr. 80 Va. 22
Burwell's Admrs. vs. Fauber, 21 Grat. 446
Tilley vs. Bridges, 105 Ill. 336

There is really no contention on the part of either of the parties to this action upon the two propositions above referred to, The plaintiff rests its entire case upon a determination of the rights of the plaintiff upon the construction its officers have placed upon the laws of the United States, the plaintiff insisting that this Indian, Henry Taylor, was an Indian with the qualifications named in the Act of Congress of March 3, 1875, that he filed upon the land in question on the 8th day of October, 1878, entered the land in controversy, as a homestead, under the provisions of Section 15 of the Act of Congress of 1875, which is as follows:

"That any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations, shall, on making satisfactory proof of such abandonment, under the rules to be prescribed by the Secretary

of the Interior, be entitled to the benefits of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twentieth, eighteen hundred and sixty-two, and the acts amendatory thereof, except that the provisions of the eighth section of the said act shall not be held to apply to entries made under this act; Provided, However,
That the title to lands acquired by any Indian by virtue
139 hereof shall not be subject to alienation or incumbrance,
either by voluntary conveyance or the judgment, decree or order of any Court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor; Provided, That any such Indian shall be entitled to his distributive share of all annuities, tribal funds, lands, and other property, the same as though he had [maintain--] his tribal relations; and any transfer, alienation, or incumbrance of any interest he may hold or claim by reason of his former tribal relations shall be void."

That said Taylor made his final proof of settlement and residence on said land as required by the Homestead laws of the United States, from which it appeared that he actually took up his residence thereon June 10, 1879, and resided there continuously until the date of his final proof, to-wit: December 11, 1884.

That the homestead papers show that said Taylor was a Santee Sioux Indian and on the date of said final proof the receiver's final receipt was issued to Taylor showing the payment of the final fee by him and on the same date his final homestead certificate was also issued which shows the same to be an Indian Homestead Entry.

Thereafter on the 6th day of June, 1890, a patent was issued to said Taylor by the officers of the United States, similar in form to other homestead patents, except that there is inserted a conditional clause as follows:

"This patent is issued upon the express condition that the
title hereby conveyed shall not be subject to alienation
140 or incumbrance either by voluntary conveyance or by
judgment, decree or order of any Court, or subject to taxation, of any character, but shall remain inalienable and not subject to taxation for the period of twenty years from the date hereof, as provided by Act of Congress approved June eighteenth eighteen hundred and eightyone."

In the meantime the Act of July 4, 1884, was passed, which provides as follows:

"That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior,

or otherwise, hereafter, so locate, may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices one thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

141 The findings of fact further show that the President of the United States, on the 10th day of June, A. D. 1909, caused to be issued and delivered to the said Indian, Taylor, a patent for said land in form usual in the case of homestead patents, containing the following clause:

"Know ye, that the United States of America, in consideration of the premises, and in accordance with the provisions of said Act of Congress of July 4, 1884, hereby declare that it does and will hold the land above described (same being the land in controversy herein) for the period of twenty five years, in trust, for the sole use and benefit of the said Henry Taylor, or in case of his decease, of his widow and heirs, according to the laws of the state where such land is located, and at the expiration of said period the United States will convey the same by patent to the said Henry Taylor, or his widow and heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever; subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purpose, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws and decisions of the Courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted as provided by law.

This patent is issued in lieu of one containing the twenty year trust clause, dated June 6, 1890, which has been [cancelled]."

142 As above stated, there is no contention upon the facts in the case, and the defendant shows, as appears from the agreed statement of facts, that the said Henry Taylor, on the 8th day of August, 1908, entered into a contract with the defendant, J. E. Peart, for the sale of said premises and that thereafter this contract was duly assigned to the defendant, William W. Fletcher. That Taylor refused to make conveyance in pursuance of said contract and on the 21st day of November, 1908, said Fletcher instituted a suit against Taylor and wife in the United States Circuit Court for the District of South Dakota, to compel the specific performance of said contract. That said Court entered a decree for the specific performance of said contract, and a commissioner was appointed and conveyance made.

It is admitted that Peart and his assignee fully complied with all the terms and conditions of the contract referred to, and was entitled to said decree if Taylor's title was such that he could make legal conveyance of the land.

Reduced to its final analysis, the question resolves itself into a determination of the rights of the parties hereto, under a proper construction of the laws of the United States above quoted, to-wit: the Act of Congress of March 3, 1875, providing a five year prohibition of alienation, and the Act of July 4, 1884, providing a twenty five year prohibition of alienation, under which the final patent was issued to Taylor in 1909.

(a) It is unnecessary to anything more than state the proposition that the Act of 1881, the provisions of which were followed in the issuance of the original patent to Taylor had no application whatever to his rights and was void.

143 (b) The defendant contends that Taylor, having perfected his five [years] residence upon his homestead, was under the homestead laws, entitled to his patent on the 10th day of June, 1884. That the law of 1884 was not passed until July 4, 1884, and therefore that his patent although his proof was not made until December 11, 1884, should have issued under the provisions of the law of 1875, with a five year limitation of alienation, first, because his right to make final proof had accrued before the passage of the law of 1884, and second, because the law of 1884, has no application to Indians of the kind or class named in the law of 1875. In other words, that the law of 1875, applies to the persons specifically named in the first paragraph of section 15 "an Indian born in the United States, who is the head of a family, is twenty-one years of age, who has abandoned or may hereafter abandon his tribal relations," etc., and that the Act of 1884 applies to "such In-

dians as may now be located on public lands, or as may under the direction of the Secretary of the Interior, or otherwise, hereafter so locate", the same being an entirely other and different class of Indians, not having the qualifications prescribed by said section 15 of the law of 1875.

Defendant contends that these two statutes should stand and be given the constructions above indicated, and that the latter law is not and should not be construed as amending the former.

With this contention I cannot agree. These two statutes must be construed together, and the language therein employed must be given its ordinary meaning, in the light of the then existing conditions prompting the legislation. It is my judgment that the law of July 4, 1884, amended section 15
144 of the law of March 3, 1875, extending the period of limitation of alienation from five years to twenty-five years.

U. S vs. Saunders, 96 Fed. 268
Frazee vs. Spokane Co., 69 Pac. 779
Frazee vs. Piper, 98 Pac. 760.

The first provision of the law of 1884 is "that such Indians as may now be located on public lands—" The Act of Congress of March 3, 1875, was the only statute in existence at that time giving an Indian the right to locate on public lands.

In other words, at the time of the enactment of the law of 1884 all Indians then located on public lands were so located under and by virtue of the provisions of the Act of March 3, 1875. Of necessity, therefore, the law making body must have had in mind those Indians that had taken alvantage of the Act of 1875 when in the very beginning of this statute they refer to "such Indians as may now be located on public lands."

It has been insisted that public lands upon which Indians had located were in fact no longer "public lands." That the location of an Indian upon public lands, under the Act of 1875, segregated it from the public domain, and therefore this land that had been located upon by this Indian prior to the passage of the law of 1884 had been segregated and was not at the time of the passage of that Act "public lands."

This suggestion appealed to me as a legal, technical construction of the words "public lands." I am convinced, however, that, taking this statute, viewing its purpose and remembering the policy of the Government toward these Indian people, that it referred to all of those who had settled upon

the public lands of the United States, under the provi-
145 sions of the only law that, up to that time, had given them any right to settle thereon, to-wit: the statute of March 3, 1875.

This act of 1884 related to two classes of Indians, to "such Indians as may now be located on public lands or as may, under the direction of the Secretary of the Interior or otherwise, hereafter so locate." In my opinion, Henry Taylor was within the first class. He had then located on public lands under the Act of March 3, 1875, the only statute that permitted an Indian to locate upon public lands, and the purpose and effect of the Act of July 4, 1884, was to amend the law of March 3, 1875, as to both classes of Indians, that is both as to those who were then located on public lands and to those who might thereafter so locate, extending the period of alienation of five years, and declaring "all patents therefor shall be of the legal effect and declare that the United States does and will hold the land thus entered, for the period of twenty five years", etc.

Under the facts as they are disclosed in this record, it is my judgment that Taylor had not fully complied with all the requirements essential to the perfecting of his title. He had not made his final proof in accordance with the laws, rules and regulations made pursuant to statute, and had not received his receipt and final certificate.

At the time of the passage of the Act of July 4, 1884, he was a resident upon this public land of the United States, having filed under the provisions of the Act of 1875, was within the class of Indians referred to in the Act of 1884, and by the plain provisions of that Act was protected in the
use and occupancy of the land, without the power of
146 alienating it for twenty five years, pursuant to the plan that was being developed by the Government of the United States for the protection of these dependent people.

Something has been said of a vested right in this Indian. Until final patent is actually issued; it is very clear that it is for the Government to say when this guardianship shall cease, and the time may be extended or further limitations made at the will of Congress. It is for Congress to say. National legislation has tended more and more towards the education and civilization of the Indians. But the question whether any Indian has become so far advanced in civilization that they should be let out of the state of tutelage and admitted to the privileges and responsibilities of citizenship, is a

question to be decided by the nation whose wards they are and whose citizens they seek to become.

Taking the decisions of the Courts of the United States altogether, it may be taken as the settled doctrine, that Congress, in pursuance of the long established policy of the Government, has a right to determine for itself when the [guardianship] which has been maintained over the Indian shall cease. It is for that body and not the Courts to determine when the true interests of the Indian requires his release from such condition of tutelage.

Tiger vs. Western Investment Co. 221 U. S. 286.

While not necessarily controlling upon this Court, it is evident upon the face of this record that the officers of the United States whose duty it was to administer these laws of the United States, by the issuance of the patent of
147 June 10th, 1909, admitted the error in the provisions of the patent issued to Taylor June 6, 1890, and by the issuance of the last patent construed the Act of 1884 as an amendment to the Act of 1875, affecting the rights and interest of this Indian, Henry Taylor, and that under the facts and circumstances presented to them and presented here now, it was and is the duty of the United States to hold the title to the premises in question for this Indian, Taylor, and his heirs, under the provisions of the law of 1884, for twenty-five years from the date of the issuance of said patent.

A settled construction by a department of the United States, of the laws of the United States, will not be overturned by the Courts unless such construction is clearly wrong.

United States vs. Healy, 160 U. S. 136
Hewitt vs. Schultz, 180 U. S. 139
States vs. Finnel, 185 U. S. 236

While it is true that the decisions of the Land Department on matters of law are not binding upon this Court in any sense, yet, on questions similar to the one involved in this case, they are entitled to great respect at the hands of any Court, The construction given to a statute by those charged with the duty of executing it, is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons.

United States vs. Moore, 95 U. S. 760.

Having these suggestions in view, it is my judgment that the correct rule of interpretation is that these two statutes of 1875 and 1884 relate to the same things, and they must both be taken into consideration in considering the rights of these

parties. It is an established rule of law that all acts
148 in pari materia are to be taken together as if they were one law.

U. S. vs. Freeman, 15 U. S. 548

3 Howard 556

Remembering, in construing these statutes, that the Congress of the United States has, from the early history of the Government, undertaken to deal with the Indians as dependent people and to legislate concerning their property with a view to their protection as such, it seems to me clear that the Act of 1884 was a recognition that the five year alienation period was not sufficient to protect the Indians in their dependant condition, and the Act of 1884 was an expressed intention upon the part of Congress, in whom the power was vested, to extend that period to all Indians who theretofore had located, or who might thereafter locate on public lands, under the provisions of the homestead laws of the United States, to the term of twenty-five years.

It must be remembered too that this Indian, Henry Taylor, is not here complaining of this guardianship of his property, but is content, and desirous of claiming under the patent issued to him under the provisions of the law of 1884, and the Government of the United States is here alleging that he made final proof of his right to the premises in question under the law of 1884, which extended to him the benefits of the twenty five year period of limitation upon alienation.

It follows that the contract of sale under which defendants claim, was executed by the Indian, Henry Taylor, and wife, without authority of law, and his grantee, Peart, and those claiming under him, have and can claim no right, title or interest in or to said premises, and that the contract of
149 record, together with assignments and other conveyances are void and should be cancelled.

From the foregoing it also appears that the lands in question should not have been taxed upon the dates named in the agreed statement of facts, by the officers of Moody County, in the State of South Dakota. This cannot be done so long as the Government of the United States has an interest, either legal or equitable, or is charged with the performance of some obligation or duty respecting the same.

The Government has not yet relinquished its full title to the lands described in the complaint herein and they are therefore not taxable.

Frazee vs. Spokane Co. 69 Pac. 779
U. S. vs. Rickert, 106 Fed. 1, with citations.

The judgment of this Court against the said Indian, Taylor, with reference to the premises in question, was entered in a proceeding to which this plaintiff was not made a party, and the same, and the deed made pursuant thereto, are of no effect as against this plaintiff, and should be cancelled.

It also follows that the judgment of Ballard & Son named in the petition is not a lien on said premises.

The tax liens and tax deeds and evidences of title founded upon the taxation proceedings referred to in the complaint herein, are void, and judgment should be entered cancelling the same.

It follows that Findings of Fact, Conclusions of Law, and Judgment should be entered for the plaintiff upon all of the issues, and it is so ordered.

Approved. J. D. E.

150 Endorsed: Filed in the District Court on March 27, 1912.

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151 (Clerk's Certificate to Transcript.)

United States of America,
District of South Dakota,
Southern Division—ss:

I, Oliver S. Pendar, Clerk of the District Court of the United States, in and for the District of South Dakota, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing, consisting of 150 pages, numbered consecutively from 1 to 150 inclusive, is a true and complete transcript of all of the record, process, pleadings, orders and final decree as enumerated in the written stipulation of the parties to this cause filed herein, directing the Clerk what parts of the record and papers to be included within such transcript, as fully as the same appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original Citation, together with the proof of service thereof, and in addition thereto a copy of said Stipulation; and also all written opin-

ions of the Court filed in said cause, as provided by the rules of your Honorable Court.

Seal
U. S. Dist. Court
Dist. of South Dakota,
Sioux Falls.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, in the said District, this 28th day of August, A. D. 1912.

OLIVER S. PENDAR,
Clerk.

Filed Sep. 16, 1912. John D. Jordan, Clerk.

94 (Appearance of Messrs. Rice & Benson, as counsel for appellants, Louis Hemmer et al.)

United States Circuit Court of Appeals, Eighth Circuit.

LOUIS HEMMER, WILLIAM W. FLETCHER, J. E. PEART, and Moody County, South Dakota, appellants,
vs.
UNITED STATES OF AMERICA. } No. 3850.

The clerk will enter my appearance as counsel for the appellants.

GEO. RICE,
LEWIS BENSON,
Counsel for Appellants, Louis Hemmer, William W. Fletcher, and J. E. Peart.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Sept. 16, 1912.

(Appearance of Mr. Frederick A. Warren, as counsel for appellant, Moody County, South Dakota.)

The clerk will enter my appearance as counsel for the appellants.

FREDERICK A. WARREN,
State's Attorney for Moody County, South Dakota; Counsel for Appellant, Moody County, South Dakota; Flandreau, South Dakota.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Sept. 16, 1912.

(Appearance of counsel for the appellee.)

The clerk will enter my appearance as counsel for the appellee.

EDWARD E. WAGNER,
United States Atty. for Dist. of South Dak.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 13, 1912.

95 (Order of submission.)

December term, 1912.

THURSDAY, *January 9, 1913.*

This cause having been called for hearing in its regular order, the same was argued by Mr. George Rice and Mr. Frederick A. Warren for appellants. The appellee presents no oral argument.

Thereupon this cause was submitted to the court on the transcript of record from said district court and the briefs of counsel filed herein.

96 (Opinion.)

United States Circuit Court of Appeals, Eighth Circuit.

December term, A. D. 1912.

LOUIS HEMMER ET AL., APPELLANTS,
vs.
THE UNITED STATES OF AMERICA, APPELLEE. } No. 3850.

Appeal from the District Court of the United States for the District of South Dakota.

Mr. George Rice and Mr. Frederick A. Warren, (Messrs. Warren & Shoemaker and Messrs. Rice & Benson were with him on the brief), for appellants.

Mr. Edward E. Wagner appeared on the brief for appellee.

Before SANBORN, circuit judge, and WILLIAM H. MUNGER and TRIEBER, district judges.

SYLLABUS.

1. Equity—Claims of United States—Rules applicable to private party govern.

In a suit in equity the claims of the United States appeal to the conscience of the chancellor with the same, but with no greater or less force than those of a private individual under like circumstances, and they are determinable by the same rules and principles.

2. Statutes—Special and general legislation on same subject.

Privileges granted to a certain class by special legislation are not affected by an inconsistent general law unless a contrary intent of the legislative body is clearly expressed, or indubitably inferable from the acts, but the special act and the general law stand together, the one as the law of the specific class and the other as the general rule.

97 3. Land Department—No jurisdiction to divest equitable titles.

Neither the Land Department of the United States nor its officers has any jurisdiction by subsequent rulings and decisions to divest the equitable title to lands which becomes vested in preemptors, homesteaders, and other like claimants by their final proof and their payment therefor in accordance with the acts of Congress.

4. Land Department—Statutes—Construction of officers not conclusive on courts.

The construction of statutes entrusted to them to enforce by officers of the Land Department, or of any other executive department, is persuasive and should not be overruled without good reason, but their opinions are not conclusive upon the courts.

It is the function and duty of the officers of the judicial department of a government, which they may not lawfully renounce, to exercise their own independent judgments, guided only by the established principles of law and the recognized canons of interpretation, in the construction of its statutes and to adjudge their just and true meaning, even though the officers of an executive department have construed them otherwise.

5. Indians—Homesteads alienable—Statutes—Construction—18 Stat., 420, and 23 Stat., 96.

The act of March 3, 1875, 18 Stat., 420, chap. 131, section 15, granted to nontribal Indians the right to acquire homesteads with the restriction of five years on alienation by a compliance with the homestead laws. The act of July 4, 1884, 23 Stat., 96, granted to Indians, whether tribal or nontribal, the right to acquire homesteads with the restriction of twenty-five years on alienation without paying the fees or commissions of the land officers, by a compliance with the other requirements of the homestead law.

Held: The later act did not repeal, amend, or modify any of the provisions of the earlier act. It did not extend from five years to twenty-five years the restriction on alienation of the lands acquired by an Indian homesteader under the act of 1875.

SANBORN, circuit judge, delivered the opinion of the court:

The act of Congress of March 3, 1875, 18 Stat., 402, 420, chap. 131, sec. 15, provided that any Indian who was the head of a family, or who had arrived at the age of twenty-one years, and had abandoned, or should thereafter abandon, his tribal relations, should be entitled to the benefits of the homestead law, Revised Statutes, sections 2289, 2290, 2291, but that the title to the lands he should acquire should be inalienable for five years from the date of his patent therefor. Henry Taylor was such an Indian of the Sioux Tribe. On
98 October 7, 1878, he entered under this act the 160 acres of land in South Dakota, which is the subject of this suit, as his homestead. On June 10, 1879, he entered upon the actual occupation thereof and resided upon, occupied, and cultivated it with his family from that time until he sold it to J. E. Peart on August 8, 1908. The homestead law provided, section 2291, that any one who for five years after his entry resided on and cultivated his homestead and complied with the terms of the homestead law should be entitled to a patent therefor upon proof of compliance at any time within two years after the expiration of the five years. On June 10, 1884, Taylor had so complied with the terms of this law, and he was entitled to a patent to his land under the act of 1875 upon proof of his compliance made at any time before June 10, 1886. He made his final proof, paid for the land, and obtained his final receiver's receipt on December 11, 1884.

On July 4, 1884, after Taylor had completed his five years of residence and cultivation of his homestead and thus had completely

earned it, Congress passed an act which provided that any Indians who then were or should thereafter be located on the public lands might avail themselves of the homestead laws, that $1,000 was appropriated to aid them in selecting and proving these homesteads, that no fees or commissions should be charged for their entries and proofs, and that their patents should declare that the United States would hold their lands for twenty-years in trust for them and at the end of that time would convey the title thereof to them, respectively. On June 6, 1890, the United States issued to Taylor a patent to his homestead which, by mistake, declared that his land was inalienable for twenty years, as provided by an act of Congress approved January 18, 1891, relating to the Winnebago Indians, which had no relevancy to his case or his title. On June 10, 1909, the Government issued another patent to Taylor for this land which declared that it was issued in lieu of the previous patent which had been cancelled, that in accordance with the provisions of the act of July 4, 1884, the Government would hold his land in trust for him for twenty-five years and would convey it to him at the end of that time. On August 8, 1908, Taylor sold this land and delivered the possession of it, and that possession and whatever title Taylor could convey have passed by sufficient deeds to the defendant below, Louis Hemmer. On July 28, 1909, the United States brought this suit in equity against the immediate and remote grantees of Taylor for the purpose of setting aside all the conveyances under which they held, against the treasurer and auditor of Moody County, wherein the land was situated, against a claimant under a tax sale, and against a judgment creditor of Taylor, for the purpose of avoiding their liens upon the land, upon the ground that this homestead was inalienable, exempt from taxation and from judgment liens for twenty-five years after the date of the patent issued under the act of 1884. The court below rendered a decree to that effect which is challenged by this appeal.

99 If when the conveyances here in question were made and the liens were placed Taylor's homestead was subject to the restrictions upon alienation and taxation prescribed by the act of July 4, 1884, the decree below was right, Heckman v. United States, 224 U. S., 413, and the question whether or not it was so subject must be determined by the acts of Congress and not by the terms of the patents issued to Taylor. United States v. Saunders, 96 Fed., 268; Frazee v. Spokane County, 69 Pac., 779. The patents and their terms are, therefore, here dismissed and we turn to the sole question in the case: Did the act of July 4, 1884, which was not passed until after Taylor had completely earned the title to his homestead subject to the restriction of only five years upon its alienation imposed by the act of 1875, so amend that act as to extend that restriction to twenty-five years?

The United States offered this land to Taylor by the act of 1875, free from all restrictions upon alienation after five years from the date of his patent, on the sole condition that he would reside upon

and cultivate it and endure the toils and privations of frontier life for five years. That offer he accepted in the only way in which it could be accepted, by five years of actual residence, occupation, and cultivation of the land. He proved his compliance with the offer to the satisfaction of the Government, paid the prescribed fees for his final entry and obtained his final receipt therefor under the act of 1875, and the purchasers from him have bought his land and paid for it in reliance upon this act of Congress and these facts. These purchasers, the grantees under Taylor, stand in his shoes. They have every legal right and every equitable right and title which he held.

This is a suit in equity. In such a suit the claims of the Government appeal to the conscience of the chancellor with no greater or less force than those of a private individual under similar circumstances. United States v. Stinson, 197 U. S., 200, 201, 202, 205; United States v. Detroit Timber & Lumber Co., 131 Fed., 668, 677, 67 C. C. A., 1, 10; State of Iowa v. Carr, 191 Fed., 257, 267, 112 C. C. A., 477, 487.

In equity no one may successfully deny to the damage of another the truth of statements and representations by which he has purposely or carelessly induced that other to change his situation. By its offer by the act of 1875 of the title to and the full power of disposition of this land at the end of ten years in consideration of its occupation and cultivation for five years, the United States induced Taylor to earn it and the grantees under him to buy and pay for it, and it ought to be estopped now from repudiating or modifying its offer and representations to their injury. Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed., 271, 293, 22 C. C. A., 171, 193; Paxson v. Brown, 61 Fed., 874, 881, 10 C. C. A., 135, 142; Union Pacific Railway Co. v. Chicago, R. I. & Pac. Ry. Co., 51 Fed., 309, 326, 327, 2 C. C. A., 174, 191, 192.

100 "A court of equity can act only on the conscience of a party. If he has done nothing that taints it, no demand can attach upon it so as to give any jurisdiction." Boone v. Chiles, 10 Pet., 177, 209; United States v. Detroit Timber & Lumber Co., 131 Fed., 668, 677, 678, 67 C. C. A. 1, 10, 11; United States v. Winona & St. Peter R. R. Co., 67 Fed., 948, 961, 968, 15 C. C. A., 96, 109, 116. It is difficult to find anything that the defendants have done in this case to taint their consciences. If A had offered to convey to B a tract of 160 acres of land with full power of disposition at the end of ten year in consideration that B would settle upon, occupy, and cultivate it for five years, and B had done so and the ten years expired, who would be so bold as to claim that there would be any jurisdiction in equity on a bill by A to enjoin B from selling or conveying the land during twenty years more?

Even when equities are equal the defendant prevails. It is only when the case of the complainant appeals to the conscience of the chancellor with the greater force that he will interfere to grant relief. Town of St. Johnsbury v. Morrill, 55 Vt., 165, 169; 2 Pomeroy's

Equity Juris., sec. 739. These principles of equity are very persuasive that the question here at issue ought not to be answered in the affirmative unless inexorable rules of law demand such an answer. What then are the arguments in support of an affirmative answer to this question? Counsel cite Frazee v. Spokane County, 69 Pac., 779, 782, and Frazee v. Piper, 98 Pac., 760, but they fail to sustain it.

In the former case nontribal Indians were trying to defeat tax titles. They had entered and taken possession of their land in 1883, but they had cultivated and occupied it until May 31, 1890, before they made their final proof. The court held that inasmuch as they had resided upon and cultivated their homestead more than five years after the passage of the act of 1884 before they made their final proof they had the option to prove up and take their patents under the act of 1884 with a restriction of twenty-five years on alienation and taxation, and that as they had done so their lands were not taxable within that period. In the latter case the Indian homesteader challenged a contract of sale which he had made, on the ground that his land had been entered and patented under the act of 1884 and was subject to the twenty-five years' restriction on alienation. He had first entered and occupied it in 1883 and had resided upon and cultivated it from that time until May 31, 1890, when he made his final proof under the act of 1884, and he subsequently took his title under that act. The court held that inasmuch as he had resided upon and cultivated his land for five years after the passage of the act of 1884 before he made his final proof, and as he had taken his title under that act, his land was subject to the restriction for twenty-five years specified therein, but that "had Gregorie Frazee's right to the homestead been perfected under the act of 1875, and had he been entitled to make final proof under that act before the act of 1884 was passed" (as Taylor was), "a different condition would be pre-
101 sented, and the five years' restriction on his right of alienation for which the act of 1875 provided, would not have been extended by the act of 1884."

In United States v. Saunders, 96 Fed., 268, 270, cited by the court below, a nontribal Indian entered in 1878, occupied and cultivated his homestead for the full five years under the act of 1875, and made his final proof before the act of 1884 was passed, and the court held that the act of 1884 imposed no further restriction upon his power of alienation. There is nothing in these cases favorable to an affirmative answer to the question at issue and the decision in United States v. Saunders is a clear adjudication that it should be answered in the negative, for when Taylor had completely earned his land and had secured his final receipt for it under the act of 1875 his equitable title to it was perfected and could not be subsequently modified by any action of the officers of the Land Department.

The case of Tiger v. Western Investment Company, 221 U. S., 286, is drawn to our attention, but the decision in that case is inapplicable here. Tiger was an adult heir of an Indian allottee, the

alienation of whose land was restrained for five years by section 16 of the act of June 30, 1902, 32 Stat., 500, chap. 1323. On April 26, 1906, 34 Stat., 137, the Congress passed an act which extended the restriction upon alienation of the lands of adult heirs of allottees to twenty-five years from the date of the approval of that act. That act expressly provided that all acts and parts of acts inconsistent with it were repealed, 221 U. S., 303. The Supreme Court held that a conveyance by Tiger after the five years and within the twenty-five years was void. But the act of 1884, which conditions the decision of this case, contains no words or terms which either expressly or by reasonable implication extend the restriction prescribed by the act of 1875, and it contains no provision repealing that act, or any acts or parts of acts inconsistent with the act of 1884. This cast must, therefore, be determined by other rules and principles than those applied by the decision in Tiger's case.

Counsel present an argument upon which much reliance seems to be placed, which may be stated in this way: (1) The act of 1884 provides: "That such Indians as may now be located on the public lands, or as may * * * hereafter so locate, may avail themselves" of the homestead laws and acquire lands subject to a restriction upon alienation for twenty-five years. (2) The nontribal Indians who had entered homesteads under the act of 1875 were the only Indians located on the public lands when the act of 1884 was passed. (3) Therefore the act of 1884 referred to the homesteaders under the act of 1875 and extended the restriction upon the alienation of their lands from five years to twenty-five years. It may be conceded that if the premises of this syllogism were sound and if the homesteaders under the act of 1875 had availed
102 themselves of the act of 1884, the restrictions upon their homesteads would have been extended to twenty-five years. But Taylor never availed himself of the provisions of the act of 1884. He made his final proof, paid for his land and took his final receipt under the act of 1875. Moreover, the minor premise of the syllogism is without support in the record. There is neither pleading, nor admission, nor proof, that the homesteaders under the act of 1875 were on July 4, 1884, the only Indians located on the public lands. If that were the fact this court has no judicial knowledge of it and no evidence on which to rely to sustain a finding of it, and with the fall of this premise the conclusion which depends upon it goes down.

The decision in the case of Shiver v. United States, 159 U. S., 491, 498, 499, to the effect that lands which have ceased to be "public lands" by their segregation therefrom by preemption, homestead, mining, and other like claims, Newhall v. Sanger, 92 U. S., 761, 763; Bardon v. Northern Pacific R. R. Co., 145 U. S., 535, 539; Hastings & Dakota R. R. Co. v. Whitney, 132 U. S., 357, 364; James v. Germania Iron Company, 107 Fed., 597, 603, 46 C. C. A., 476, 482; Hartman v. Warren, 76 Fed., 157, 160, 22 C. C. A., 30, 33; Neff v. United States, 165 Fed., 273, 281, 91 C. C. A., 241, 249, but to which the

claimants have not perfected their title are still so far lands of the United States that the Government may protect them from waste by the cutting of timber or otherwise, as a remainder man may protect premises from waste by the occupant is cited, and much is said of the power of the United States to withdraw such lands from disposition and to impose restrictions upon their alienation at any time before it parts with the title. But the extent of that power is not material to a decision of this case if no attempt was made to exercise it. Whatever its extent it is vested in the Congress and not in the attorneys for the United States, the officers of the Land Department, or the courts. Their power and duty is limited in cases of this character to an administration and enforcement of the acts of Congress, and until it clearly appears that the Congress has attempted to impose a restriction by the act of 1884 upon homesteads acquired under the act of 1875, a consideration and discussion of its power to do so is deferred.

Finally, counsel invoke the rules that the construction of statutes by officers of executive departments charged with the duty of administering them should not be overruled without cogent reasons. United States v. Moore, 95 U. S., 760, and that a settled construction of such statutes by the officers of one of the great executive departments of the Government should not be overruled unless it is clearly erroneous. But the most settled construction by the Land Department of the law applicable to this case is conceded by all parties to have been wrong. That was the construction evidenced by the patent issued to Taylor in 1890 to the effect that his land was subject to a restriction on alienation of twenty years under the act of 1881 which related to the Winnebagoes and had no relevancy to the rights of Taylor, who
103 was a Sioux Indian. This construction remained settled until 1907 when the department ruled that the decision in United States v. Saunders, 96 Fed., 268, 270, to the effect that the act of 1884 did not affect the restrictions upon the alienation of the lands of homesteaders under the act of 1875, and it was after and doubtless in reliance upon these decisions that the defendant Fletcher bought this land of Taylor in August, 1908. It was not until June, 1909, that the Land Department evidenced by the issue of the patent to Taylor of that date that it construed the act of 1884 to extend the restriction upon the alienation of his land from five years to twenty-five years. This last construction, however, is not as well settled as that of 1900, for it is not five years since it was adopted, and the construction of 1900 remained settled for about seven years. There is not, therefore, any settled construction of these acts of Congress by the officers of the Land Department to prevent their true interpretation.

Moreover, the Land Department and its officers are without jurisdiction by subsequent erroneous rulings and decisions to divest the equitable title to lands which becomes vested in lawful claimants under the preemption or homestead laws by their final proof and payment therefor in accordance with the acts of Congress. Cornelius

v. Kessel, 128 U. S., 456, 461; Love v. Flahive, 205 U. S., 195, 199; James v. Germania Iron Company, 107 Fed., 597, 602, 46 C. C. A., 476, 481; Howe v. Parker, 190 Fed., 738, 739, 111 C. C. A., 466, 467.

A decision of a question of law by the officers of the Land Department, or by any officer of any other executive department, is never conclusive upon the courts. Wisconsin Central R. R. Co. v. Forsythe, 159 U. S., 46, 61; United States v. Murphy, 32 Fed., 376, 380, 382; Northern Pacific Ry. Co. v. Sanders, 47 Fed., 604, 609–12; United States v. Grand Rapids & I. R. Co., 154 Fed., 131, 136. And it is the function and duty of the officers of the judicial department of a government, which they may not lawfully renounce, to exercise their own independent judgments, guided only by the established legal principles and the recognized canons of interpretation, in the construction of its statutes and to adjudge their just and true interpretation, even though the officers of an executive department have construed them otherwise. Deming v. McClaughry, 113 Fed., 639, 640, 641, 51 C. C. A., 349, 350, 351; Hartman v. Warren, 76 Fed., 157, 162, 22 C. C. A., 30, 36; Webster v. Luther, 163 U. S., 331, 342; United States v. Tanner, 147 U. S., 661, 663; Merritt v. Cameron, 137 U. S., 542; United States v. Graham, 110 U. S., 219; Swift, C. & B. Mfg. Co. v. United States, 105 U. S., 691.

The arguments in support of the contention that the act of 1884 so amended the act of 1875 as to extend the restriction upon the alienation of homesteads earned under the latter act have now been reviewed and they seem to present no insuperable legal obstacle to the opposite conclusion. Let us now take the two acts of
104 Congress, apply to them the indubitable rules for the interpretation of statutes upon the same or similar subjects and ascertain their true legal effect.

The act of 1875 was a special law on the subject of Indian homesteads, limited to a small and specific class of Indians, those who had abandoned or should abandon their tribal relations, and it granted the right to homesteads to members of this class only under the restriction of five years upon their alienation. The act of 1884 was a general law on this subject of Indian homesteads, and it granted to Indians, whether they had abandoned their tribal relations or not, rights to homesteads subject to restrictions for twenty-five years on their alienation. The first and most impressive characteristic of the later act, when it is examined to ascertain its effect upon the earlier one, is that it contains no terms or words whatever that indicate any intent on the part of the legislators to amend, modify, repeal, or affect in any way the act of 1875, the restriction upon alienation there imposed, or any of its other provisions. The act of 1884 contains no reference to the act of 1875, or to any of its provisions, and it does not even contain a clause repealing acts or parts of acts inconsistent with its own provisions. Privileges granted to a certain class by special act are not affected by inconsistent general legislation, unless a contrary intent of the legislative body is clearly expressed or indubitably inferable therefrom. But the

special act and the general law stand together, the one as the law of the particular class and the other as the general rule. Frost v. Wenie, 157 U. S., 46; State v. Stoll, 17 Wall., 425, 436; Rosencrans v. United States, 165 U. S., 257, 262; Townsend v. Little, 109, U. S., 504, 512; Petri v. Creelman Lumber Co., 199 U. S., 487, 499; Ex parte United States, 226 U. S., 420, 424; Gowen v. Harley, 56 Fed., 973, 976, 978, 979, 6 C. C. A., 190, 193, 195, 196; Christie-Street Commission Co. v. United States, 136 Fed., 326, 332, 333, 69 C. C. A., 464, 470, 471; Board of Comm'rs v. Aetna Life Ins. Co., 90 Fed., 222, 227, 32 C. C. A., 585, 590; Bear v. Chicago Great Western Ry. Co., 141 Fed., 25, 27.

In Frost v. Wenie, 157 U. S., 46, 57, 58, the act of May 28, 1880, provided that all of the Osage Indian lands unsold and unappropriated, with immaterial exceptions, should be subject to disposal to actual settlers "having the qualifications of preemptors on the public lands" only. These Osage lands were within that portion of the Fort Dodge Military Reservation lying north of the Atchison, Topeka & Santa Fe Railroad. The act of December 15, 1880, provided that all these lands should be offered to actual settlers under the homestead laws only, and the question was whether by the later act the rights of parties specified in the former act were so modified and restricted that they could take lands under the homestead laws only. The Supreme Court held that they were not affected by the later act and said:

"It is to be observed that although the words of the act of December 15, 1880, are broad enough, if literally interpreted, to
105 embrace all the lands within the abandoned Fort Dodge Military Reservation north of the Atchison Railroad, there are no words in it of express repeal of any former statute. It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute. McCool v. Smith, 1 Black, 459, 468; United States v. Tynen, 11 Wall., 88, 93; Red Rock v. Henry, 106 U. S., 596, 601; Henderson's Tobacco, 11 Wall., 652; King v. Cornell, 106 U. S., 395, 396."

This opinion seems directly to rule the case in hand. Again, even when two acts upon the same subject are repugnant in some of their provisions, the later act modifies or repeals the earlier act so far, and only so far, as its provisions are repugnant to the provisions of the earlier one. In re Henderson's Tobacco, 11 Wall. 652, 657; Board of Comm'rs v. Aetna Life Ins. Co., 90 Fed., 222. No repugnancy is perceived between the imposition of a restriction for five years on the homesteads of nontribal Indians by the act of 1875

and the imposition of a restriction on the alienation of homesteads of all Indians who avail themselves of the privilege of the act of 1884 for twenty-five years, or between any of the other provisions of these two acts.

Taylor had occupied and cultivated his homestead for five years and had thereby accepted the offer of the Government and closed its contract with him to grant him the land with a restriction upon its alienation for only five years if he made his final proof within two years before the act of 1884 was passed. A construction which would apply the restriction of that act to the previous offer to and contract with Taylor and change them into an offer and contract for the land subject to a restriction on alienation for twenty-five years necessarily gives the act of 1884 a retrospective and mandatory effect, while its terms are prospective and permissive only. It provides that any Indians may in the future avail themselves of the homestead laws subject to restrictions on the alienation of their lands for twenty-five years, not that nontribal Indians who availed themselves of the homestead laws under the act of 1875, or any other Indians, must avail themselves of the act of 1884, or subject themselves to its restrictions. A construction which gives a statute a retrospective effect should never be adopted unless it appears clearly and unequivocally that the legislative body enacted it with the intention to produce that effect. United States Fidelity & Guar. Co. v. Struthers Wells Co., 209 U. S., 306, 314, 316; Endlich, Interpretation of Stat., sec. 271; Twenty Per Cent cases, 20 Wall., 179, 187; National Bank of Comm. v. Riethmann,
106 79 Fed., 582, 25 C. C. A., 101; Jaedickie v. United States, 85 Fed., 372, 375; McClellan v. Pyeatt, 66 Fed., 843, 846, 14 C. C. A. 140, 143.

Finally, "All statutes in pari materia are to be read and construed together as if they formed part of the same statute and were enacted at the same time." Potter, Dwar, St., 145; Board of Comm'rs v. Aetna Life Ins. Co., 90 Fed., 222, 227, 32 C. C. A., 585, 590.

If the act of 1875 and the act of 1884 be read as one act passed at the same time, they provide that there is granted to nontribal Indians the right to acquire homesteads upon payment of the officers' fees subject to a restriction on alienation for five years, and that there is granted to all Indians the right to acquire homesteads subject to a restriction on alienation for twenty-five years without the payment of any officers' fees. Every provision of each act has its complete effect, every promise of the Government is fulfilled, every right of each homesteader is preserved and protected and every rule of construction is obeyed. If the act of 1884, be read as an amendment of the act of 1875 and given the effect of an amendment or modification thereof, and of an imposition upon the lands of homesteaders under that act of a restriction upon their alienation for twenty years more than the five years fixed by the act of 1875, the offer and promise of the United States contained in that act is broken,

the rights of the homesteaders under it are violated, the provision of the act of 1875 which granted to nontribal Indians the right to homesteads with a restriction on alienation of only five years, is annulled and the indisputable canons of interpretation which have been cited are disregarded. Our conclusion is that the act of July 4, 1884, 23 Stat., 96, does not repeal or modify any of the provisions of the act of March 3, 1875, 18 Stat., 402, 420, that all the provisions of the two acts stand together and remain in force, that the act of 1875 grants to nontribal Indians the right to acquire homesteads with a restriction of only five years on their alienation, that the act of 1884, grants to all Indians the right to homesteads with a restriction of twenty-five years on alienation and that the latter act did not have the effect to extend the restriction on the alienation of the land of Taylor, a homesteader, under the act of 1875 from five years to twenty-five years, or to affect that restriction in any way. The decree below must accordingly be reversed and the case must be remanded to the court below with directions to dismiss the bill.

It is so ordered.

Filed April 25, 1913.

107 (Decree.)

United States Circuit Court of Appeals, Eighth Circuit.

December term, 1912.

FRIDAY, *April 25, 1913.*

LOUIS HEMMER, WILLIAM W. FLETCHER, J. E. PEART, AND Moody County, South Dakota, appellants, *vs.* UNITED STATES OF AMERICA. } No. 3850.

Appeal from the District Court of the United States for the District of South Dakota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of South Dakota, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said District Court, in this cause, be, and the same is hereby, reversed without costs to either party in this court.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court, with directions to dismiss the bill of complaint.

April 25, 1913.

(Petition for appeal to the Supreme Court, U. S.)

United States Circuit Court of Appeals for the Eighth Circuit.

Louis Hemmer, William W. Fletcher, J. E. Peart, Richards Trust Company, Iowa and Dakota Land Company, Fred D. Henderson, as treasurer of Moody County; E. A. Hornby, as auditor of Moody County, South Dakota; Job Robinson, S. W. Ballard, and L. W. Ballard, copartners as Ballard & Son, and Moody County, South Dakota, appellants, *vs.* The United States of America, appellee.	No. 3850.

108 The above-named appellee respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of appeals for the Eighth Circuit, and that a decree has been rendered therein on the twenty-fifth day of April, A. D. 1913, reversing the decree of the United States District Court for the District of South Dakota, that the matter in controversy in said suit exceeds one thousand dollars besides costs, and that this is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, the said appellee prays that an appeal be allowed it in the above-entitled cause, directing the clerk of said court to send the record and proceedings in said cause and all things concerning the same to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellee may be reviewed and corrected according to the laws and customs of the United States.

Robert P. Stewart,
Solicitor for Appellee, the United States of America.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 19, 1914.

(Assignment of errors on appeal to the Supreme Court, U. S.)

Now comes the United States of America, appellee herein, and says that in the record, proceedings, and decision of the United States Circuit Court of Appeals for the Eighth Circuit in the above-entitled cause there is manifest error, and now makes, presents, and files the following assignment of errors, upon which the appellee, the United States of America, will rely upon the appeal from the judgment and decision of the United States Circuit Court of Appeals for the Eighth Circuit.

1.

The United States Circuit Court of Appeals for the Eighth Circuit erred in holding and deciding that the act of July 4, 1884, 23 Stat., 96, did not repeal or modify any of the provisions of
109 the act of March 3, 1875, 18 Stat., 402, 420.

2.

That said court erred in holding and deciding that no repugnancy existed between the provisions of the act of March 3, 1875, 18 Stat., 402, 420, and the act of July 4, 1884, 23 Stat., 96, whereby the provisions of the act of 1875, imposing a five-year restriction upon alienation of the homesteads of nontribal Indians were extended by the act of 1884 to twenty-five years, and in holding that no provisions of the act of 1884 were repugnant to the provisions of the act of 1875.

3.

The said court erred in holding and deciding that all the provisions of the two acts, viz, March 3, 1875, and July 4, 1884, should be interpreted as standing together and each thereof as remaining in full force and effect without conflict or repugnancy as to any provision of either act.

4.

The said court erred in holding and deciding that the act of March 3, 1875, grants to nontribal Indians the right to acquire homesteads with a restriction of only five years on their power of alienation, and that said period of nonalienation is not extended to twenty-five years by the act of July 4, 1884.

5.

The said court erred in holding and deciding that the act of March 3, 1875, granted Taylor, a homesteader, the right to acquire his homestead with a restriction of only five years against his alienation thereof, and in deciding that the act of July 4, 1884, did not have the effect of extending the restriction against his alienation of said homestead from five to twenty-five years.

6.

The said court erred in holding and deciding that the act of July 4, 1884, did not affect the restriction against alienation of Taylor's homestead in any way, and in refusing to decide that the act of July 4, 1884, extended the period of nonalienation under the act of March 3, 1875, from five to twenty-five years.

110

7.

The said court erred in deciding and ordering in its judgment and decree dated April 25th, 1913, and entered in the office of the clerk of said court on the 25th day of April, 1913, that the decree of the District Court of the United States for the District of South Dakota, rendered on the 16th day of April, A. D. 1912, and entered in the office of the clerk of said District Court on the said 16th day of April, 1912, should be reversed and the said cause remanded from the said Circuit Court of Appeals of the United States to the said District Court of the United States for the District of South Dakota, and that the bill of the United States herein be dismissed.

8.

The said court erred in holding and deciding that the settled construction of the act of July 4, 1884, by the officers of the Land Department of the United States, to the effect that the restriction upon the alienation of Taylor's land was extended from five to twenty-five years, should be overruled and disregarded, and in deciding that any reason existed for overruling and disregarding said settled construction of said act of July 4, 1884.

9.

The said court erred in holding and deciding that the provisions of the act of July 4, 1884, did not indicate any intention on the part of the legislators to amend, modify, repeal, or affect in any way the act of 1875, the restriction upon alienation there imposed, or any of its other provisions.

10.

The said court erred in holding and deciding that Taylor had completely earned the title to his homestead subject to the restriction of only five years imposed by the act of March 3, 1875, and that the said act of 1875 was not amended by the act of July 4, 1884, so as to extend that restriction to twenty-five years, and in refusing to decide that the said act of 1884 applies to the same class of persons as the act of 1875.

11.

The said court erred by failing and refusing to decide and determine in its said decision that the United States of America
111 was and is the owner of the fee title to the land involved in this suit and holds the same in trust for the sole use and

benefit of said Henry Taylor, or, in case of his decease, for his widow and heirs, according to the laws of South Dakota.

12.

The said court erred in failing and refusing to decide and determine in its said decision that the contract entered into by and between Henry Taylor and Anna Taylor, his wife, and J. E. Peart, the assignment thereof to the defendant Fletcher, the decree of the United States Circuit Court in the case of William W. Fletcher versus Henry Taylor and Anna Taylor, entered in the office of the clerk of said court Decemver 30th, 1908, decreeing the specific performance of said contract, and the deed executed by F. A. Spafford to the defendant Fletcher February 5, 1909, and recorded February 10, 1909, in book 29 at page 28 thereof, the deed from the defendant Fletcher to the defendant Hemmer, purporting to convey said premises to the latter, and having been recorded February 8th, 1909, in book 30 at page 6 thereof were, and each and all of said instruments are void, and that the same be cancelled, vacated, set aside and held for naught, and that the tax deeds and all tax proceedings of the officers of Moody County, South Dakota, respecting said land, be cancelled and held for naught.

13.

The said court erred in deciding that the equities in said cause were in favor of the appellants, and that the United States was not entitled to the equitable relief prayed for in its said bill.

14.

The said court erred in reversing the decree of the said district court, and in not affirming the said decree.

15.

For which errors the appellee herein, The United States of America, prays that the decision and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, dated April 25th, 1913, be reversed in all things and a decree and judgment rendered in favor of the appellee, the United States of America, as prayed for in the bill herein, and for costs.

ROBERT P. STEWART,
Solicitor for Appellee, The United States of America.

112 (Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 19, 1914.

(Order allowing appeal to Supreme Court, U. S.)

It is hereby ordered that the appeal to the Supreme Court of the United States prayed for in the above-entitled case by the United States of America be allowed.

WALTER H. SANBORN,
Presiding Judge of the United States Circuit Court of Appeals, Eighth Circuit.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 19, 1914.

(Præcipe for transcript on appeal to Supreme Court, U. S.)

To the clerk of the United States Circuit Court of Appeals, Eighth Circuit:

SIR: You will please prepare and duly authenticate a transcript of the entire record in the above-entitled cause for an appeal to the Supreme Court of the United States, excluding the formal and immaterial parts of all exhibits, documents, and other papers included therein, consisting of the printed record of the said cause in the United States Circuit Court of Appeals for the Eighth Circuit, together with the addition thereto of the record of the proceedings in the United States Circuit Court of Appeals up to and including the decree therein, and assignment of errors, petition for appeal, order allowing appeal, citation and præcipe on this appeal to the United States Supreme Court.

ROBERT P. STEWART,
Solicitor for Appellant.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 19, 1914.

113 (Return of service of copy of præcipe for transcript on appeal.)

The body of the attested copy of the præcipe is omitted at this place for the reason that the original of same is heretofore set out in full, the marshal's return of service on said attested copy being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that I served the within præcipe on Rice & Benson, F. A. Warren, and Ira F. Blewett, being all of the solicitors for the within-named appellees, at Flandreau, South Dakota, on the 23rd day of February, A. D. 1914, by handing to and leaving with each of said solicitors a true copy thereof.

Dated at Sioux Falls, South Dakota, this 23rd day of February, A. D. 1914.

SETH BULLOCK,
United States Marshal.
By E. J. ANDERSON,
Deputy.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 2, 1914.

114 In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
LOUIS HEMMER, WILLIAM W. FLETCHER, J. E. Peart, Richards Trust Company, Iowa and Dakota Land Company, Fred D. Henderson, as treasurer of Moody County; E. A. Hornby, as auditor of Moody County, South Dakota; Job Robinson, S. W. Ballard and L. W. Ballard, copartners as Ballard & Son, and Moody County, South Dakota, appellees.

Citation on appeal to United States Supreme Court. No. 3850, C. C. A.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Louis Hemmer, William W. Fletcher, J. E. Peart, Richards Trust Company, Iowa and Dakota Land Company, Fred D. Henderson, as treasurer of Moody County; E. A. Hornby, as auditor of Moody County, South Dakota; Job Robinson, S. W. Ballard and L. W. Ballard, copartners as Ballard & Son, and Moody County, South Dakota, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, sixty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein the United States of America is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

115 Witness the honorable Walter H. Sanborn, presiding judge, of the United States Circuit Court of Appeals, for the Eighth Circuit, this 19th day of February, A. D. 1914.

WALTER H. SANBORN,
Presiding Judge of the United States Circuit Court of Appeals, Eighth Circuit.

Personal service of a copy of the foregoing and within citation is hereby acknowledged at Flandreau, South Dakota, this 23d day of February, A. D. 1914.

RICE & BENSON,
Solicitors for J. E. Peart, Louis Hemmer, and William W. Fletcher.
FREDERICK A. WARREN,
Solicitor for Moody County, South Dakota, Fred D. Henderson, as treasurer of Moody County, S. D., and E. A. Hornby, as auditor of Moody County, S. D.
IRA F. BLEWETT,
Solicitor for S. W. Ballard and L. W. Ballard, copartners, as Ballard and Son.

116 (Indorsed:) (Original.) No. 3850 C. C. A. In the U. S. Circuit Court of Appeals of the United States for the Eighth Circuit. The United States of America, appellant, vs. Louis Hemmer et al., appellees. Citation on appeal to the United States Supreme Court, of No. 3850, C. C. A. Filed Feb. 27, 1914, John D. Jordan, Clerk. Robert P. Stewart, solicitor for appellant, United States of America.

117 (Clerk's certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of South Dakota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, and prepared in accordance with the præcipe of counsel for the Government, in a certain cause in said Circuit Court of Appeals wherein Louis Hemmer et al. are appellants, and the United States of America is appellee, No. 3850, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

I do further certify that on the ninth day of July, A. D. 1913, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the judges of the District Court of the United States for the District of South Dakota.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this seventh day of March, A. D. 1914.

[SEAL.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Indorsement on cover:) File No. 24093. U. S. Circuit Court Appeals, 8th Circuit. Term No. 942. The United States, Appellant, vs. Louis Hemmer, William W. Fletcher, J. E. Peart et al. Filed March 10th, 1914. File No. 24093.

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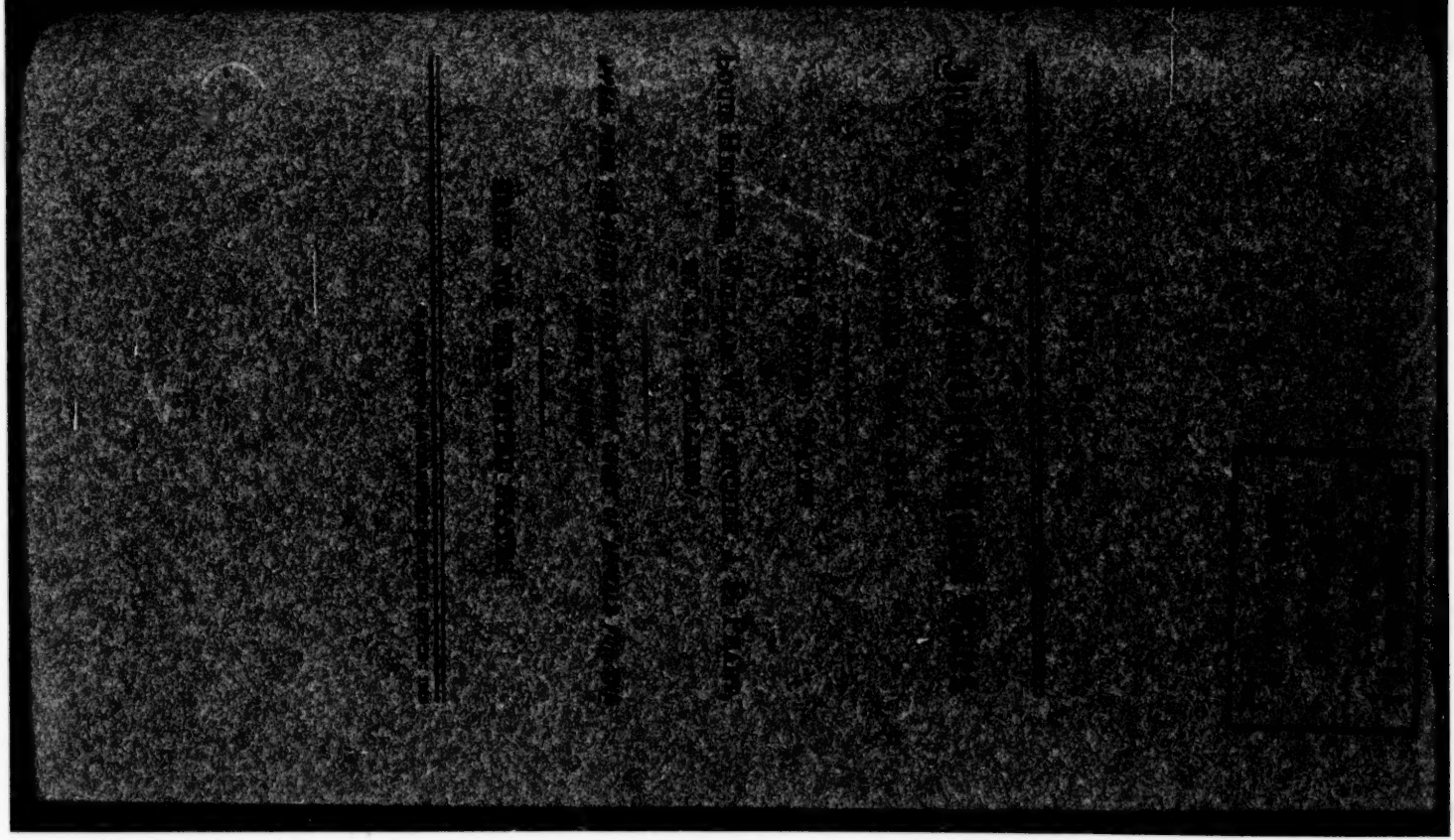

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES
v.
LOUIS HEMMER, WILLIAM W. FLETCHER, J. E. Peart, et al., appellees.
No. 86.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Opinion of District Court reported 195 Fed. 790.

Opinion of Circuit Court of Appeals reported 204 Fed. 898.

This suit was brought to protect the homestead of one Henry H. Taylor, a full-blood Indian, from certain conveyances, a decree of the Circuit Court of the United States and proceedings, past and threatened, by the taxing officials of the State of South Dakota. It was tried upon an agreed statement of facts (R. 18) and the Government obtained in the District Court a favorable opinion

(R. 69) and a decree (R. 54) upholding its position completely and granting all of the relief prayed. Upon appeal the decree was reversed by the court below for reasons stated at length in its opinion (R. 95). The case is brought here not only because of its own importance, but because there are questions of statutory construction involved which seriously affect other cases existing and the future administration of the laws respecting homesteads entered by Indians.

The homestead law of May 20, 1862 (12 Stat. 392, sec. 1), authorized the entry of a homestead by "any person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who shall have filed his declaration of intention to become such." (See R. S. 2289.)

In order to extend this right to Indians, Congress inserted the following provisions in the deficiency appropriation act of March 3, 1875 (c. 131, 18 Stat. at p. 420), viz:

> SEC. 15. That any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations, shall, on making satisfactory proof of such abandonment, under rules to be prescribed by the Secretary of the Interior, be entitled to the benefits of the act entitled, "An act to secure homesteads to actual settlers on the public domain," approved May twentieth, eighteen hundred and

sixty-two, and the acts amendatory thereof, except that the provisions of the eighth section of the said act shall not be held to apply to entries made under this act: *Provided, however,* That the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor: *Provided,* That any such Indian shall be entitled to his distributive share of all annuities, tribal funds, lands, and other property, the same as though he had maintained his tribal relations; and any transfer, alienation, or incumbrance of any interest he may hold or claim by reason of his former tribal relations shall be void.

SEC. 16. That in all cases in which Indians have heretofore entered public lands under the homestead law, and have proceeded in accordance with the regulations prescribed by the Commissioner of the General Land Office, or in which they may hereafter be allowed to so enter under said regulations prior to the promulgation of regulations to be established by the Secretary of the Interior under the fifteenth section of this act, and in which the conditions prescribed by law have been or may be complied with, the entries so allowed are hereby confirmed, and patents shall be issued thereon; subject, however, to the restrictions and limitations contained in the fifteenth section of this act in regard to alienation and incumbrance.

On October 7, 1878, Henry Taylor made his initial homestead entry on 160 acres of public land in the then Territory of Dakota. He was a full-blood Indian of the Santee-Sioux Tribe, born in the United States, who had arrived at the age of twenty-one years, and had abandoned his tribal relations at the time when the entry was initiated. He established his residence upon the land and resided there continuously, complying with the homestead act, so that by October 8, 1883, he was in a position to make his final proof and final entry and obtain patent. (R. 19.) The homestead law required (R. S. 2291), as a condition precedent to the issuance of the final certificate, and of course the patent, that, after having completed his five years' residence from the date of entry, the applicant prove by two credible witnesses that he had for that period resided upon and cultivated the land, and make the affidavit of nonalienation and the oath of allegiance to the Government. Henry Taylor did not attempt to comply with these requirements until December 11, 1884, when he made the final proof, paid the final fee, and received his final receipt and certificate. (R. 31, 37, 39.)

In the meantime, new legislation regulating the taking of homesteads by Indians had appeared in the Indian appropriation act of July 4, 1884 (c. 180, 23 Stat., at p. 96), viz:

> That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate may avail themselves

> of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices, one thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

The occasion and inducement of this legislation will be explained *infra*. It will be observed that, whereas the act of 1875, in force when the entry was initiated, provided for the issuance of a fee patent with a five-year restriction upon alienation, the act of 1884, in force when the final proof was made, provides for the issuance of a trust patent declaring that the United States will hold the land in trust for 25 years and make the conveyance of unrestricted title at the expiration of that period.

It was held by the court below that in the case of Taylor patent should have issued under the earlier act with the five-year restriction. It was held by the District Court, and it is the contention of the Government, that the patent should have issued under the act of 1884—a trust patent withholding the power of conveyance for twenty-five years from its date. By what is now conceded to have been a mistake of the Land Department, and one which occurred in a number of other instances, the patent which was first issued to Taylor did not conform to either of these enactments, but was framed in accordance with an act relating primarily to the Winnebago Indians—the act of January 18, 1881 (21 Stat. 315–317),[1] which provides for a fee patent with a twenty-year period of restriction. This patent was issued to Taylor June 6, 1890, and is set forth in the agreed statement (R. 20). As this instrument was outstanding, and as the period of restriction therein expressed had not expired, when the transactions chal-

[1] Section 5 of this act provides:

> That the titles acquired by said Winnebagoes of Wisconsin in and to the lands heretofore or hereafter entered by them under the provisions of said act of March third, eighteen hundred and seventy-five, shall not be subject to alienation or incumbrance, either by voluntary conveyance or by the judgment, decree, or order of any court, or subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty years from the date of the patent issued therefor. And this section shall be inserted in each and every patent issued under the provisions of said act or of this act.

lenged by the bill occurred, we here repeat its restrictive provision, viz:

> This patent is issued upon the express condition that the title hereby conveyed shall not be subject to alienation or incumbrance, either by voluntary conveyance or by judgment, decree or order of any court, or subject to taxation of any character, but shall remain inalienable and not subject to taxation for the period of twenty years from the date hereof, as provided by act of Congress approved January 18, 1891 [1881].

The initial entry of Taylor was undoubtedly made under the act of 1875, for, in the homestead papers which accompany the statement of facts as exhibits, there is an affidavit by him which was executed and filed with the original application, which sets forth his status as an Indian who had abandoned tribal relations and adopted the habits of civilized life. (R. 27.) Similar statements also are found in the initial homestead affidavit. (R. 26.) A receipt issued by the receiver at the time of final proof December 11, 1884, for $4, "being the balance of payment required by law for the entry of," etc., indicates that the entry was proceeding under the act of 1875 without reference to the act of 1884, which dispenses with the payment of Land Office fees. The final certificate, however, issued by the register (R. 39) bears this notation: "The patent in this case is subject to the twenty years limit clause"—probably made in the department, at Washington.

Taylor continued to hold the land under the erroneous patent and occupy it with his family undisturbed until August 8, 1908. On that day he and his wife executed a contract (Exhibit C, R. 21) with the appellee J. E. Peart, agreeing to convey all the land by a good and sufficient warranty deed in consideration of $2,400—$550 of which was to be satisfied by conveyance to them of another lot of land, and the balance to be withheld to await the furnishing of a clear abstract of title and warranty deed to Peart. Such, at least, is our understanding of the peculiar language of the contract, aided by the decree of specific performance subsequently based upon it. (R. 40.) It does not appear clearly that the Taylors received any money on account of this contract (cf. R. 24 and 40). Peart, on September 8, 1908, assigned it to the appellee William W. Fletcher. Taylor and his family took possession of the lot which Peart by the contract agreed to convey them, and Peart took possession of the Taylor land; but Taylor and wife refused to convey to Peart or Fletcher, and on November 21, 1908, the latter brought suit against them in the United States Circuit Court to compel specific performance of the contract. The case was heard on bill and answer, and on December 30, 1908, the court gave a decree for the plaintiff, directing Taylor and wife to convey to Fletcher upon his paying to them "the consideration in such contract mentioned, to wit, the sum of $2,400," and providing that if they refused to do so within thirty days the conveyance should be made by a special

master. (R. 40.) As the Taylors declined to convey, the special master made his deed to Fletcher on February 4, 1909. It is set out in the record at page 40 and recites the decree in full. Fletcher conveyed to the appellee Hemmer by a deed dated February 5, 1909 (R. 43), and Hemmer now claims to own the land and has been in possession of it since the commencement of this suit (R. 24). Taylor refused tender of a deed made out to his wife (R. 53) for the lot which Peart was to convey to Taylor and wife jointly as part of the consideration mentioned in the contract, and also refused to accept the whole or any part of $1,000 left by Peart with his attorneys as "the balance of the purchase price under said contract." (R. 24.) In April, 1909, he attempted to move, with his family, back to his own homestead, but was denied possession by Hemmer, who at all times since has refused him possession of any part of it (*ib.*).

Taylor's predicament was brought to the attention of the Acting Commissioner of Indian Affairs, who, on May 12, 1909 (R. 38), addressed a letter to the Secretary of the Interior reciting some of the facts and requesting that the patent of June 6, 1890, be canceled and a new one issued under the provisions of the act of July 4, 1884. The recommendation was approved by the First Assistant Secretary (R. 39) and, on June 10, 1909, a new patent was issued accordingly (R. 24, and Exhibit G, R. 44) in the form required by the latter act. The Government now claims to hold the land in trust for the Indian pursuant to the terms of

this patent. The statement of facts (R. 19, par. 5) shows that the defendants objected to the use of the Commissioner's letter upon the ground that it was incompetent and immaterial, not binding upon the defendants or the patentee, and that it concerned a matter not pending before the Indian Department. The defendants, on the other hand, over the objection of the complainant, introduced four letters (Exhibits H to H4, inclusive, R. 46–51), all dated in 1907 and purporting to have been signed by the then Acting Commissioner of Indian Affairs. In these letters the opinion is expressed that the issuance of the first patent with the twenty-year restriction was erroneous, and that as Taylor, by the sixth section of the general allotment act of February 8, 1887 (24 Stat. 388), had become a citizen of the United States and amenable to the laws of the State, his lands were subject to taxation by the State and to sale and alienation by himself. The statement of facts (R. 24) affirms that Peart had these letters in his possession before entering into the contract with Taylor and "claims to have relied thereon in making said contract."

The appellees Henderson and Hornby are the treasurer and auditor, respectively, of Moody County, where the land in controversy is situate. The county, through its treasurer, auditor, and board of commissioners, assessed and levied taxes on the land in the year 1894 and every succeeding year, caused it to be sold for taxes, and still claims the right to tax it. (R. 25.)

The bill alleges (R. 10, 11), and the trial court finds (R. 57) that the defendants Richards Trust Company and Iowa and Dakota Land Company claim interests under tax deeds from the county. Job Robinson was alleged to claim under a similar instrument, and S. W. Ballard and L. W. Ballard, copartners as Ballard & Son, were brought in by the bill as claiming under a judgment lien. Robinson, the Richards Trust Company, and the Iowa and Dakota Land Company suffered default. (R. 55.)

The trial court, holding with the Government, decreed it to be the owner of the land in trust for Henry Taylor, or in case of his decease, his widow and heirs; set aside the contract with Peart, the assignment thereof to Fletcher, and the decree and master's deed; also the tax deeds and all tax proceedings affecting the land, and the claims of the Ballards and Robinson; and enjoined the defendants and all persons claiming under them from claiming or asserting any interest or estate in the premises adverse to Taylor. (R. 58.) Only Hemmer, Fletcher, Peart, and the county authorities joined in the appeal to the court below. (R. 62.)

The trial court held that the act of 1884 was intended to supersede the act of 1875, by extending the period of restriction from five to twenty years. In this connection the opinion says (R. 91):

> Remembering, in construing these statutes, that the Congress of the United States has, from the early history of the Government, undertaken to deal with the Indians as dependent people and to legislate concerning their

property with a view to their protection as such, it seems to me clear that the act of 1884 was a recognition that the five-year alienation period was not sufficient to protect the Indians in their dependent condition, and the act of 1884 was an expressed intention upon the part of Congress, in whom the power was vested, to extend that period to all Indians who theretofore had located, or who might thereafter locate on public lands, under the provisions of the homestead laws of the United States, to the term of twenty-five years.

It must be remembered too that this Indian, Henry Taylor, is not here complaining of this guardianship of his property, but is content, and desirous of claiming under the patent issued to him under the provisions of the law of 1884, and the Government of the United States is here alleging that he made final proof of his right to the premises in question under the law of 1884, which extended to him the benefits of the twenty-five year period of limitation upon alienation.

Disposing of the claim that Taylor's rights were so far vested when the later act was passed that they could not be affected by it, the opinion notices the fact that he had not made his final proof or received his final receipt or certificate, and further observes that, in the case of the Indians, it is for the Government to say when the guardianship shall cease, and that, certainly at any time before a patent in fee has issued, Congress may lawfully legislate for the protection of their titles, citing the case of *Tiger* v. *Western Investment Co.*, 221 U. S. 286.

The learned court below approached the case in a very different way. The court does not question, but in effect concedes, the power of Congress to subject Taylor's land to the terms of the act of 1884 if it saw fit to do so. The opinion, however, assumes throughout that such a change would be detrimental to the Indian entryman rather than a desirable protection, and therefore examines the relations of the two statutes jealously from the standpoint of "vested rights," and, applying the strict rules of construction concerning implied repeals, finds that the act of 1875 was a special act and the act of 1884 a general act covering the same and other subject matter, but not necessarily inconsistent and containing no express words of repeal. Hence both must be allowed to stand.

> This is a suit in equity. In such a suit the claims of the Government appeal to the conscience of the chancellor with no greater or less force than those of a private individual under similar circumstances [citing cases]. (R. 98.)

Further quotations will indicate the court's feeling that the position taken by the Government in a suit supposed to have been brought for the protection of a helpless Indian (*Starr* v. *Long Jim*, 227 U. S. 613) amounts to an inequitable attack upon his "vested rights."

R. 98:

> In equity no one may successfully deny to the damage of another the truth of statements and representations by which he has

purposely or carelessly induced that other to change his situation. By its offer by the act of 1875 of the title to and the full power of disposition of this land at the end of ten years in consideration of its occupation and cultivation for five years, the United States induced Taylor to earn it and the grantees under him to buy and pay for it, and it ought to be estopped now from repudiating or modifying its offer and representations to their injury [citing cases].

"A court of equity can act only on the conscience of a party. If he has done nothing that taints it, no demand can attach upon it so as to give any jurisdiction" [citing cases].

It is difficult to find anything that the defendants have done in this case to taint their consciences. If A had offered to convey to B a tract of 160 acres of land with full power of disposition at the end of ten years in consideration that B would settle upon, occupy, and cultivate it for five years, and B had done so and the ten years expired, who would be so bold as to claim that there would be any jurisdiction in equity on a bill by A to enjoin B from selling or conveying the land during twenty years more?

Even when equities are equal the defendant prevails. It is only when the case of the complainant appeals to the conscience of the chancellor with the greater force that he will interfere to grant relief [citing cases]. These principles of equity are very persuasive that the question here at issue ought not to be answered in the affirmative unless inexorable rules of law demand such an answer.

R. 102–3:

The act of 1875 was a special law on the subject of Indian homesteads, limited to a small and specific class of Indians, those who had abandoned or should abandon their tribal relations, and it granted the right to homesteads to members of this class only under the restriction of five years upon their alienation. The act of 1884 was a general law on this subject of Indian homesteads, and it granted to Indians, whether they had abandoned their tribal relations or not, rights to homesteads subject to restrictions for 25 years on their alienation. The first and most impressive characteristic of the later act, when it is examined to ascertain its effect upon the earlier one, is that it contains no terms or words whatever that indicate any intent on the part of the legislators to amend, modify, repeal, or affect in any way the act of 1875, the restriction upon alienation there imposed, or any of its other provisions. The act of 1884 contains no reference to the act of 1875, or to any of its provisions, and it does not even contain a clause repealing acts or parts of acts inconsistent with its own provisions. Privileges granted to a certain class by special act are not affected by inconsistent general legislation, unless a contrary intent of the legislative body is clearly expressed or indubitably inferable therefrom. But the special act and the general law stand together, the one as the law of the particular class and the other as the general rule.

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R., 104:

> Taylor had occupied and cultivated his homestead for five years and had thereby accepted the offer of the Government and closed its contract with him to grant him the land with a restriction upon its alienation for only five years if he made his final proof within two years before the act of 1884 was passed. A construction which would apply the restriction of that act to the previous offer to and contract with Taylor and change them into an offer and contract for the land subject to a restriction on alienation for 25 years necessarily gives the act of 1884 a retrospective and mandatory effect, while its terms are prospective and permissive only. It provides that any Indians may in the future avail themselves of the homestead laws subject to restrictions on the alienation of their lands for 25 years, not that nontribal Indians who availed themselves of the homestead laws under the act of 1875, or any other Indians, must avail themselves of the act of 1884, or subject themselves to its restrictions. A construction which gives a statute a retrospective effect should never be adopted unless it appears clearly and unequivocally that the legislative body enacted it with the intention to produce that effect.

SPECIFICATION OF ERRORS.

The errors complained of, which are covered in the assignments in various ways, are such as were committed in reversing the decree of the District Court and in holding that the act of 1884 did not

apply to the case of Taylor, and that the land was alienable and taxable notwithstanding the provisions of that act and the restrictions expressed in Taylor's patent.

ARGUMENT.

I.

THE SINGLE QUESTION TO BE DECIDED IS WHETHER CONGRESS, BY THE ACT OF JULY 4, 1884, MEANT TO PROVIDE A REVISED AND EXCLUSIVE METHOD OF REGULATING HOMESTEAD ENTRIES BY INDIANS OR INTENDED TO LEAVE THE EXISTING LAW OF MARCH 3, 1875, IN OPERATION INDEPENDENTLY.

As will be demonstrated later on, the act of 1884 includes the whole subject matter of the act of 1875 and very little of substance in addition. The court below holds that, there being no repugnancy and no words of express repeal, both acts must be given continuing and independent operation. For illustration, Taylor qualified under both, might elect to enter a homestead under the act of 1875, pay the land-office fees, and obtain a fee patent with a five-year restriction. Another point made in the opinion is that the later act should not in any event be construed retrospectively so as to include the case of an Indian who had already become entitled to make final proof. And still another proposition is that in a court of equity the Government ought to be "estopped" from violating its "contract" with an Indian who has gone as far under it as Taylor did; that is, such a court, unless positively compelled, will not lend a hand in subjecting his title to the longer

period of restraint on alienation, protection from taxation, etc., which the later act affords, even at the suit of the Government itself.

Under the present heading we will state our reasons for believing that the determinative question and the only question deserving much discussion is the question whether the later act supplanted the early one. If it affected it at all it must have supplanted it entirely.

1. Assuming that the act of 1884 was intended to supersede generally the act of 1875, the question whether the changed conditions were extended to pending, unperfected entries like Taylor's is also a question of intention and not a question of power.

The opinion of the court below almost concedes that no question of legislative power is presented. For the protection of the Indians Congress has power to extend restrictions even after patent (*Tiger* v. *Investment Company*, 221 U.S. 286); *a fortiori* has it the power to revise the terms upon which it will issue patents in cases where the right to patent has not been established.

2. The same reasoning which demonstrates the incompatibility of the two statutes demands that the later statute be applied to every case coming fairly within its terms. This includes the case of Taylor.

The act of 1884 manifests a marked stiffening of the protective policy—twenty-five years restriction instead of five. If it is reasonable to hold that this change means an abandonment of the act of 1875 as to all entries subsequently initiated, it is equally rea-

sonable to extend it to all entries pending, if they fall within the letter, as they do within the spirit, of the later act.

Looking at the letter, we find that the act of 1884 applies to "such Indians as may *now* be located on public lands" as well as to such "as may * * * hereafter so locate." Taylor, at the date of the act, was "located" on public lands both physically and technically. His case fits the letter exactly.

Such was the construction of the statute adopted by the Acting Attorney General in an opinion delivered to the Secretary of the Interior on July 27, 1888 (19 Op. 161, 166), from which we quote the following:

> I am of opinion that this act of 1884 was intended to be supplemental to and somewhat in modification of the act of 1875, and that its provisions apply to all entries made under the act of 1875 for which patents had not issued at the time the act of 1884 went into effect. But all lands entered and patented under the act of 1875, before the act of 1884 became a law, are, I think, governed by the former act alone, and therefore alienable by the settler and subject to his liabilities after a period of five years from the date of the patent, there being no provision in the act of 1884 for recalling patents already issued under the act of 1875 and replacing them by others drawn in conformity to the act of 1884.

The reliance of the court below upon the general rule against applying statutes retrospectively betrays a lack of confidence in the theory that the first statute remained wholly unaffected by the second. It also proves that the court failed to grasp the true purpose of the added restriction. The purpose was, not to be niggardly with the Indians, but to afford them more protection. *Starr* v. *Long Jim, supra*. The rule cited is but a guide to the legislative intent; it assumes that, in most cases, the legislature will not desire to upset what has been done, or what is in progress, under existing law, and thus cause inconvenience and hardship, even though it have the power. Like all subordinate rules of construction, this one has no function if the purpose and scope of the statute are plain. If Congress intended the act of 1884 to govern all future Indian homestead entries, and if, possessing the power to extend the new restrictions to pending entries as well, it used language clearly calculated to include them, and if the reason for the new restriction applies, as it does, to future and existing entries without distinction, there can be no place for a cut and dried presumption against retrospection.

Furthermore, the retrospection discountenanced by the court below is hardly more than imaginary. The new act did not undertake to disturb anything that had been accomplished under the old one. The Indian was allowed to make his final proof as before; he was relieved of the land-office fees and guaranteed a safer patent. As for the sanctity of his "contract" upon which the court below has laid so much stress,

we respectfully submit that the implied power and duty of Congress to make the changes necessary for his protection were as much a part of the contract as was anything written in the earlier statute.

3. Some observations on the lower court's theory of estoppel.

Frankly, we do not grasp this part of the opinion. If Congress had the power to add to the restriction, and intended to do so, what place for an estoppel? Could Congress be estopped from the exercise of a constitutional power? Could the executive be estopped from enforcing a constitutional act of Congress? Would a court of the United States be authorized to refuse judicial recognition to such a law? The federal court of equity is the proper forum in which to enforce the policy of Congress respecting the Indian lands, (*Heckman* v. *United States*, 224 U. S. 413), the right of Congress to extend the Indians' disability even after patent is fully recognized, (*Tiger* v. *Investment Co.*, 221 U. S. 286); yet in this case the court below has closed its doors against the Government in precisely such a case, upon the authority of some higher law of "conscience."

Clearly no equities calculated to sustain an estoppel have been transmitted to the defendants from the Indian. If the court below was of the opinion that, despite the uncertainty of the evidence on the subject, the persons who claimed under his contract must be deemed to have original equities acquired by a parting with value in good faith, the decision

should have been placed on that ground, so that other Indian titles, governed by the same statutes, might not be affected. Even then, the equity would be merely an equity to obtain reimbursement from the Indian's unrestricted property, if he had any. *Heckman case, supra.*

II.

THE ACT OF MARCH 3, 1875, WAS SUPERSEDED BY THE ACT OF JULY 4, 1884, AS TO ALL ENTRIES NOT PERFECTED AND PATENTED AT ITS DATE.

1. Analysis of the two acts in comparison with the homestead act, proving that, with respect to their beneficiaries, the only distinction is that the act of 1875 applies to Indians who have severed their tribal relations, and the act of 1884 applies to them and also to Indians who remain members of a tribe.

The homestead law extends its benefits to persons who are citizens or are in process of becoming such through naturalization, who are twenty-one years of age, or are heads of families. Act of May 20, 1862; R. S. 2289.

The act of 1875 extends the benefits of the homestead law to Indians, born in the United States, who have severed their tribal relations. Citizenship, actual or becoming, is dispensed with, but the other two alternative requirements specified in the homestead law—viz, majority and family headship—are not.

The act of 1884 extends the benefits of the homestead law to Indians located or who may locate on

the public lands. To "locate" here means to make actual settlement in the sense of the homestead law (*Delorme* v. *Cordeau*, 29 L. D. 277), and necessarily implies an intention upon the part of the Indian settler to make a home for himself apart from his tribe. This act does not say that the Indian must be of age, or the head of a family, or not an alien, but these are qualifications which are necessary to be implied, because the act merely provides that the new class of beneficiaries which it creates "may avail themselves of the provisions of the homestead laws as fully *and to the same extent* as may now be done by citizens of the United States." The homestead laws, for obvious political and economical reasons, confine their benefits to citizens, actual or *in fieri*, who, by reason of their years only, or because of the maturity they have evinced and the responsibilities they have assumed by becoming heads of families, are fitted to make settlements, build homes, and otherwise fulfill the homestead policy. To permit the Indians to make entries under the act of 1884, irrespective of infancy and lack of family responsibilities, would be to permit them to avail themselves of the homestead privilege not "to the same extent," but to a greater extent than may be done by citizens. And, while the act does not say, like the act of 1875, that they must be born in the United States, this also, or its substantial equivalent, must have been intended; for it is not to be believed that Congress would hold out an invitation to the members of all

the foreign aboriginal tribes of this hemisphere, none of whom could become citizens under our laws, and invite them to join our population as aliens and here enjoy a bounty studiously withheld from other aliens who may obtain naturalization. Hence the Land Department, early construing the act of 1884, held that it applied only to Indians twenty-one years of age or heads of families, and not the subjects of any foreign country. Circular of August 23, 1884, 3 L. D. 91.

The only distinction, then, between the acts of 1875 and 1884, in so far as concerns the Indians to whom they apply, is this: The act of 1875 applies only to those who have severed their tribal relations; the act of 1884 applies to those who have done this and also to Indians who remain members of a tribe.

2. This distinction between the two acts is so insubstantial that from the standpoint of the protective policy the classes benefited must be regarded as identical.

As we have seen, to "locate" on the public lands means, in the act of 1884, to settle there with the home-making intention. An Indian who goes through this psycho-physical performance, and who thereafter continues in a good-faith compliance with the statute, necessarily adopts habits of civilized life, lives separate and apart from his tribe, and abandons in a very large degree the modes of daily living, the customs, and associations which serve outwardly to distinguish the tribesman from the exotic. True,

he may visit the tribe upon occasion, participate in its social affairs, and revert for a time to the tribal ways, but so may the Indian whose tribal relations have technically come to an end. An abandonment of tribal relations signifies a voluntary resignation of membership. This must depend upon the intention of the member. The legal results were, at the times when these acts were passed, that the Indian would lose his right to participate in the tribal affairs and, having renounced his tribal allegiance, become, in a sense, a man without a country. His act would not make him a citizen of the United States (*Elk* v. *Wilkins*, 112 U. S. 94), and there was no law under which he could become such. On the other hand, his share "of all annuities, tribal funds, lands, and other property" was expressly preserved to him by the fifteenth section, *supra*, of the act of 1875, "the same as though he had maintained his tribal relations," and any attempted transfer was declared void.

The difference between the two classes of Indians—those defined in the act of 1875 and those added by the act of 1884—is therefore seen to be technical, and not at all such as would appeal to a mind desirous of protecting the struggling individual Indian as the mind of Congress evidently was when it passed both acts. Congress, by the act of 1875, meant to encourage and invite the individual Indian to forsake his dependency on the tribe and live his own life, but it realized that his mere resolve, followed by his separation from his fellows, would neither

render him competent to be a citizen,[1] empower him to protect his own interests, nor excuse the Government in casting him upon his own sorry resources. Indeed, it was obvious that by losing the protection afforded by the tribal community he would be the more likely to become the prey of misfortune.

Congress could not have supposed then, in 1884, that Indians who had not technically severed their tribal relations, but whose condition differed in no other respect from that of the Indians specified in the earlier act, would need to be protected five times as long; for it is not to be believed that the degree of protection would be so strikingly influenced by a distinction in technical status, merely, having no relation to the need of protection or the duty to afford it.

3. The history of the act of 1884 adduced to show that an amendment of the act of 1875 must have been intended.

[The documents herein cited will be found in the appendix.]

In a letter addressed to the Secretary of the Interior May 19, 1880, the Commissioner of Indian Affairs advocated the introduction of a bill to relieve Indians making entry under the act of 1875 from the burden of paying the land office fees and commissions. After reciting the provisions of the act of 1875, and calling attention to the fees and com-

[1] Compare the act of Mar. 3, 1865, 2310–2312, R. S., concerning the Stockbridge Munsee Indians, which provided for citizenship and unrestricted title to their homesteads, if they proved their competency to the District Court and swore the oath of allegiance. Also the act of July 15, 1870, 16 Stat. 361, making a like provision concerning certain Winnebagoes.

missions which must be paid to enable Indians to take the benefit of it, the letter proceeded:

> The uncivilized or partially civilized Indians, taught to rely upon the Government to supply their daily wants, are naturally improvident, and comparatively few of them are able to command the small amount of money required.
>
> I have the honor, therefore, to recommend that, as an additional incentive to the adoption of civilized habits, where it shall appear to the satisfaction of the Honorable Secretary, that the Indian applicant for homestead privileges is acting in good faith, and that he is unable to provide the amount necessary to liquidate the fees and commissions payable thereon, he shall be permitted to make the homestead entry without payment thereof, etc.

In his annual report for 1881 the Commissioner again declared that many Indians in different parts of the country were desirous of availing themselves of the act of 1875, but owing to poverty and improvidence few could command the money necessary to pay the land office charges. He stated that in many instances the Indians, and their fathers before them, had been residing upon and cultivating public land in small tracts, but that when the land was surveyed and brought into market these occupants, through ignorance of the law and want of funds, would fail to take advantage of the act on time, with the result that white men would enter, expel the Indians, and

appropriate their improvements. He further observed:

> A condition precedent to an Indian taking advantage of the act of 1875 is that he must have abandoned his tribal relations. The policy of the Government being to break up tribal relations among the different bands of Indians, and to encourage them to take land in severalty, and to adopt the habits and pursuits of civilized life, they should receive every encouragement in their efforts in that direction.
>
> Until a change in the law as above recommended is made, it is of great importance that the department should have at its disposal a fund that can be used for the payment of entry fees and commissions, and, with that end in view, an estimate for the sum of $5,000 has been submitted.

The reports of 1882 and 1883 called attention more briefly to the recommendations already made. In both the Commissioner said:

> I have again submitted an estimate for the sum of $5,000, and trust that Congress will either *amend* the law so as to allow Indians to enter homesteads without cost to them, or will make appropriation of the sum estimated for.

Secretary Teller, in his annual report for 1883, concurred, saying:

> In this I heartily concur. I think when an Indian will settle on land, intending to make it his home, he ought to be encouraged in so doing.

The Public Domain, p. 1283.

On December 17, 1883, the Commissioner again wrote to the Secretary, referring to the earlier letter, and accompanying bill, the recommendations of the annual reports, and to fruitless attempts to secure an appropriation of money to defray the fees and commissions. The letter also reviewed the provisions of the act of 1875, and stated that the five-year period of restriction *had been enlarged to twenty years* by the act of January 18, 1881.

> It is a matter of regret [continues the letter] that so much difficulty is experienced in securing small appropriations to encourage the Indians to support themselves while large appropriations are annually made to maintain them in idleness. It frequently happens, that when an Indian evinces a desire to labor and sustain himself, assistance can not be rendered him for the want of a small appropriation.
>
> That the Indians should be encouraged in all possible ways to throw off their indolent habits, and adopt some means of gaining their own support would seem to be too plain to admit of argument. This was undoubtedly the end sought to be reached by the act extending the benefits of the homestead laws to Indians, and any measure which will promote the objects of that act should certainly receive the approval of Congress.

The letter concluded by recommending legislation permitting the Secretary to dispense with the payment of fees and commissions and enclosed a bill similar to the one proposed before.

December 19, 1883, the Secretary sent the Commissioner's letter and bill to the President, recommending that the matter be transmitted for the consideration and action of Congress.

This was done by the President's message January 7, 1884.

The legislation of 1884 must have been responsive to these recommendations. It was introduced as an amendment by the Committee on Appropriations of the Senate and adopted. Cong. Rec., 48th Cong., 1st sess., vol. 15, p. 4115. It was adopted in the lower House upon report of a conference committee. See 15 Cong. Rec., pp. 5801 and 5802, reference being had to amendment numbered 159. In both Houses certain changes were made which are here immaterial. There was no opposition or debate.

4. The act of 1884 expresses the enlightened policy of Congress, developed after the act of 1875 was passed, to protect the titles of Indians holding in severalty for at least twenty-five years.

Prior to the act of 1875 there was no general law under which an Indian could take up public land, and, prior to the general allotment act of 1887, there was none for the making of allotments. There were various treaties and laws under which portions of specific reservations might be assigned to the possession of individuals; and others in which provision was made for patents with or without restrictions. See letter of Commissioner Hayt, January 24, 1879, Report 165, H. R., 45th Congress, 3rd session.

In March, 1871, the making of treaties with Indian tribes was done away with (R. S. 2079) and all later provisions concerning their lands are to be found in the acts of Congress.

A summary review of acts of Congress relating to various tribes specifically, beginning some years before the time of the earlier Indian homestead act and extending to the general allotment act, may serve to shed light upon the growth of the protective policy and its condition when the later homestead law was adopted.

The acts of February 21, 1863 (12 Stat. 658), and July 15, 1870 (16 Stat. 361), concerning the Winnebagoes, provided for allotments, to vest "in said Indian and his heirs without the right of alienation," to be evidenced by patent. By the later of these two acts provision was made for vesting the full unrestricted title in those allottees who proved competency, etc., and became citizens, before the District Court.

The act of February 6, 1871 (16 Stat. 404), provided for inalienable allotments without patent, to be held in trust for the allottees and for their heirs, if tribal members, and in default of such heirs to revert to the tribe.

The act of June 1, 1872 (17 Stat. 213), provided for patents with restrictions until January 1, 1881.

The act of June 5, 1872 (17 Stat. 226), allowed preemptions without cost, and patents, without power of alienation, to Indians within a vacated Flathead reservation who were actually residing there

and cultivating, who were of age or the heads of families, and who would abandon tribal relations and remain there.

An act of March 3, 1873 (17 Stat. 631), gave patents to Miami Indians who proved their competency, etc., and became citizens, before the District Court. They were thereupon to lose their tribal membership, but their lands were not to be alienable during the lives of themselves and their minor children.

An act approved March 3, 1875 (18 Stat. 516), allowed unrestricted patents to certain Ottawas and Chippewas who had failed to take advantage of a like permission granted by an act of June 10, 1872 (17 Stat. 381), and an earlier treaty therein referred to. See, also, 19 Stat. 55.

The act of April 10, 1876 (19 Stat. 28–30), provided for certain allotments. The patents, however, were to be issued only upon proof of five years' cultivation, etc.; the title after patent was to be tied up for fifteen years and thereafter until released by the Secretary of the Interior.

The act of June 15, 1880 (21 Stat. 199, 201), provided for allotment patents to Ute Indians with a restriction for twenty-five years, and until removed by the President.

The act of January 18, 1881 (21 Stat. 315), under which the first patent was issued in this case, after reciting that many Winnebago Indians of Wisconsin had selected and settled in good faith upon homestead claims under the homestead act of 1875, and

had signified their desire to abandon tribal relations and adopt the habits and customs of civilized people, but in many instances were unable to do so on account of extreme poverty, made provision for paying the land office expenses out of Indian funds, and further provided (section 5):

> That the titles acquired by said Winnebagoes of Wisconsin in and to the lands heretofore or hereafter entered by them under the provisions of said act of March third, eighteen hundred and seventy-five, shall not be subject to alienation or incumbrance, either by voluntary conveyance or by the judgment, decree, or order of any court, or subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty years from the date of the patent issued therefor. And this section shall be inserted in each and every patent issued under the provisions of said act or of this act.

The act of April 11, 1882 (22 Stat. 42), provided for patents to Crow Indians with restriction for twenty-five years and until removed by the President.

The next act is that of August 7, 1882 (22 Stat. 341), providing for allotments to the Omahas. This, we think, is the first statute to contain the now familiar provision for holding the title in trust and deferring the power of alienation for twenty-five years. The words of the statute, *mutatis mutandis*, are identical with those of the Indian homestead act of 1884, and both are almost word for word the same as the standing provision found in the general allotment act of

February 8, 1887 (24 Stat. 388, section 5), except that the latter authorizes the President to extend the time. A like provision exists in every allotment act occurring between the Omaha act and the general act. See acts of March 3, 1885 (Umatillas,) 23 Stat. 340; March 3, 1885 (Sacs and Foxes), *id.* 351; January 26, 1887 (Sacs and Foxes), 24 Stat. 367.

From the foregoing it appears that the early practice of Congress varied between withholding even the promise of the right to alienate and conveying the absolute fee. But very soon after the act of 1875 was passed a protective policy was formulated which by the time of the Omaha allotment act in 1882 had assumed the definite shape in which we find it to-day. The Winnebago act of January 18, 1881, proves that Congress then thought that Indians, qualified to make entry under the act of 1875, must have twenty years' protection. Indeed, the concluding words of it may well have been intended as a general amendment of the act of 1875, as was held by the Interior Department.

5. Executive construction.

Although there are numerous references to them in the reported decisions and circulars of the Land Department, we find none in which the effect of the act of 1884 upon the act of 1875 was decided or discussed prior to the case of *Gregorie Frazee*, 43 L. D. 95, decided February 7, 1914, after the decision of the court below in the case at bar.

We have not succeeded in finding that patents were issued under the act of 1875 after the passage

of the Winnebago act of 1881. In his letter of December 17, 1883, accompanying the President's message above referred to (see appendix), the Commissioner of Indian Affairs stated confidently that the fifth section of the Winnebago act had amended the act of 1875 by extending the period of restriction to 20 years. This theory seems to have held favor in the Department both before and after the act of 1884 and a considerable number of fee patents were accordingly issued from time to time with the twenty-year restriction.

On July 27, 1888, the Acting Attorney General, in an opinion delivered to the Secretary of the Interior, discussed the effect of the restrictions in the acts of 1875, 1881, 1884, and the general allotment act of 1887. We have already quoted the language in which he expressed the conclusion that the act of 1884 had superseded the act of 1875 in all cases in which patents had not been issued at the date of the former act. This was an early and authoritative exposition of the statutes which, we submit, ought to be given much weight in determining their meaning. Why the Interior Department did not follow the views thus expressed is not explained by any document of which we have information.

6. Discussion of court decisions bearing on the question.

United States v. *Saunders*, 96 Fed. 268, per Hanford, J.;
Frazee v. *Spokane County*, 29 Wash. 278;
Frazee v. *Piper*, 51 Wash. 278;
Gregorie Frazee, 43 L. D. 95;

United States v. *Hogue* and *Same* v. *Walline*, per Wellborn, J., both are unreported. See appendix;

United States v. *Lyle Light, Power & Water Company*, per Rudkin, J., unreported. See appendix;

United States v. *Cain-Bonness Lumber & Timber Company*, 215 Fed. 212, per Neterer, J.;

Felix v. *Yaksum*, 77 Wash. 519.

In *United States* v. *Saunders*, *supra*, the entry had been completed and the final certificate issued under the act of 1875, before the act of 1884 was passed. The patent issued in 1888 according to the act of January 18, 1881, with a twenty-year restriction. The court held the 20-year condition void, that the act of 1884 must be construed prospectively and not so retroactively as to affect an entry already perfected, and that the Indian, having the full rights of a citizen under the sixth section of the general allotment act, and having acquired "the full title to his homestead" had a right to convey it. The date of the deed is not shown by the report, but presumably it was not within the five years succeeding the date of the patent.

It will be seen that this decision is not in conflict with the proposition that the act of 1884 superseded the act of 1875 as to all entries which had not gone to final proof and certificate, and that the observations concerning the general allotment act were superfluous.

Frazee v. *Spokane County*, *Frazee* v. *Piper*, and *Gregorie Frazee*, all concern the same Indian homestead entry and are based on the same state of facts. The application was made in 1883 under the act of

1875; final proof was made in 1890, and final receipt was endorsed "act of July 4, 1884. Indian homestead. No fees or commissions," indicating that although entry was originally made under the act of 1875, proof was submitted under the later enactment. In 1891 a patent was issued under the act of January 18, 1881, with a twenty-year restriction clause. In *Frazee* v. *Spokane County*, which was an action to remove a cloud caused by tax proceedings, the Supreme Court of Washington held (p. 287):

> The statute of 1884 was a continuation of the homestead privilege, with an enlargement of the time of restriction upon alienation from five to twenty-five years. Respondents had no title when the law of 1884 was passed. They were simply occupants of the land. We see no reason why they might not avail themselves of the provisions of the law of 1884, if they chose to do so; and the complaint alleges that that is what they did, which the demurrer must be held to admit. It is alleged that their proof was made in 1890, and their residence upon the land after the act of 1884 therefore covered the necessary time for their title to ripen under the homestead law.

Frazee v. *Piper* was an action to eject Piper, who had taken possession under a claim of contract. The decision in *Frazee* v. *Spokane County* was reaffirmed, but the court remarked, *obiter* (p. 285):

> Had Gregorie Frazee's right to the homestead been perfected under the act of 1875, and had he been entitled to make final proof under that act before the act of 1884 was passed, a

> different condition would be presented, and the five years' restriction on his right of alienation, for which the act of 1875 provided, would not have been extended by the act of 1884.

In the decision reported in 43 L. D. 95, *Frazee's* case was distinguished from the case at bar as follows:

> It will be observed that there is no declaration in *Hemmer* v. *United States* that the conclusions of the court in the two cases of Gregorie Frazee were wrong. On the contrary, regardless of the court's ruling that the act of 1884 did not amend or repeal the act of 1875, the statements made by the court in *Hemmer* v. *United States* leave the reasonable implication that if the facts of *Taylor's* case, as found by it, had been the same as those in *Frazee's* case, a conclusion similar to that in the latter case would have been reached. It is deduced from such statements that the decisions of the court turn primarily upon the difference in the finding of facts by it and the lower court; that the court below was wrong in finding that Taylor had not fully complied with all the requirements essential to the perfecting of his title under the act of 1875 prior to the passage of the act of 1884. But no such deductions are warranted from the statements of the court with respect to the decisions in *Frazee's* case.

In the two unreported opinions by Judge Wellborn in the cases of *United States* v. *Hogue* and *United States* v. *Walline* (see Appendix), it was held that "the act of 1884 is, in effect, an amendment to or

substitute for the act of 1875," and that the restrictive provisions of the latter act govern, whether inserted in the patent or not. In the *Hogue* case the final proof was made after the passage of the act of 1884, while in the *Walline* case it had been made five years previously. The court held that "it is immaterial whether the final proof was made before or after the passage of the act of 1884," basing its conclusion upon the propositions that Congress has power to extend the period of restriction in promotion of what it deems the best interest of the Indian, and that the evident policy of the extension provided in the act of 1884 applied without discrimination to all unpatented Indian homesteads. The court says that *United States* v. *Saunders*, *supra*, "is unsatisfactory in its reasoning and conflicts with the authortative decisions above cited."

In *United States* v. *Lyle Light, Power and Water Company* (unreported; see Appendix), decided by District Judge Rudkin in the District Court for the Eastern District of Washington in December, 1913, the facts were that an Indian who had abandoned tribal relations made entry December 3, 1881, under the act of March 3, 1875; that in May, 1888, his widow made final proof; that in February, 1890, she was issued a patent under the act of January 18, 1881, like the first patent in this case; and that in May, 1911, no further proceedings in the Land Office having intervened, she undertook to lease part of the land to the defendant's grantor. The suit was brought by the Government to annul the lease and

to recover a sum of money which had been awarded to the defendant in a condemnation suit instituted by a third party affecting the leased premises. The defendant contended that the twenty-year restriction inserted in the Indian's patent should be rejected entirely, thus allowing the patent to stand as an absolute grant, or that at most the five-year period prescribed by the act of 1875 should be read into it. Judge Rudkin, however, treated the act of 1884 as "supplemental to" the act of 1875, and held that as the act of 1884 was "in force at the time of final proof and patent" the grant to the widow should be governed by its provisions whatever the mistakes of the land officers; that the Government, therefore, was to be treated as the holder of the legal title, in trust, and entitled to maintain the action unestopped and unaffected by the erroneous patent or the judgment in the condemnation proceeding.

In *United States* v. *Cain-Bonness Lumber & Timber Co.* (215 Fed. 212), recently decided by the District Court in the Western District of Washington, the validity of a contract made in 1907 by an Indian to sell the timber and a right of way on land entered under the homestead laws, was involved. The entry had been filed in 1889 and final proof had been made in 1891 and 1895. Patent had issued in 1895, in the form prescribed by the act of 1884, before the contract complained of had been made. The court was of opinion, doubtless based on the decision by the court below in this case, that the act of 1875 was

still in force at the time of entry and patent. It further held that whether the Indian was of the class covered by the earlier act, or came only within the later, was a question which had been determined by the Land Department beyond collateral attack by the issuance of the patent. The court said (p. 217):

> The defendants also contend that as section 6 of the act of February 8, 1887, 24 Stat. 390, c. 119, conferred the right of citizenship on Indians who had severed their tribal relations and adopted the habits of civilized life, they were entitled to land entered under the homestead laws as free from restrictions as any other citizen of the United States. A similar contention was made in *Frazee* v. *Spokane County*, 29 Wash. 278, 69 Pac. 779, and the court, speaking through Justice Hadley, said:
>
> "The fact that the act of 1887 confers citizenship upon Indians who comply with certain conditions does not conflict with the law of 1884. * * * The later act does not repeal the former, unless it may be said that the provision conferring citizenship in the later one has the effect to repeal the clause in the former which places restrictions upon alienation. We do not think it had that effect. The evident design of Congress was to prepare the Indian to become a self-supporting individual, and if, as a means to that end, and for the purpose of inducing him to separate himself from his tribal relations, it saw proper to confer citizenship upon him, we are unable to see that it is repugnant to the Government's still

> retaining a certain guardianship over him, in the way of holding title to his lands in trust for a period, so that he may not be deprived of them while he is learning the lessons and duties of citizenship."

It is manifest that, not counting the decision under review, judicial authority tends strongly to support the contentions of the Government in this case.

7. The fact that Taylor was made a citizen by the General Allotment Act of 1887 is immaterial.

Section 6 of the General Allotment Act declared:

> And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

Taylor became a citizen by virtue of this section February 8, 1887, the date of the act. This was some years after he had become entitled to a patent

under the act of 1884, through the final proof made in December, 1884. For reasons not fully shown by the record no patent was issued until 1890; he then received a patent expressing a 20-year restriction on alienation, and thereafter held it for many years, without objection, until the trust patent was issued and also accepted.

It being settled by the decisions of this court that that the granting of citizenship to the Indians is entirely consistent with the policy of protecting their titles, it seems hardly necessary to argue that a grant of citizenship without more affords no justification for holding that the safeguards of a title earned are done away with.

The same act which made Taylor a citizen also made every Indian who took a trust allotment under it a citizen. By the very fact of gaining a trust patent each such Indian became a citizen. The same act and the very same section which produced this condition were certainly not intended to repeal the act of 1884 much less to sweep away the restrictions attached to entries and titles which already existed under it.

The Land Department has held that an Indian who is a citizen may if he chooses enter land under the homestead law like any other citizen. See *Feeley* v. *Hensley*, 27 L. D. 502; *Louis W. Breuninger*, 42 L. D. 489. This view may be correct; we do not question its soundness, but merely affirm that it has no application to the case at bar.

CONCLUSION.

The decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

ERNEST KNAEBEL,
Assistant Attorney General.

FEBRUARY, 1916.

SUPPLEMENTARY NOTES ON DEFENDANT'S BRIEF.

Taylor was not entitled to a patent July 4, 1884. Vital conditions of the homestead law remained to be complied with. The cases cited in defendant's brief, page 5, were cases in which the entrymen had complied with all conditions, and nothing remained but to issue patents.

The proposition (defendant's brief, p. 9) that because of Taylor's entry the land was not "public" mistakes the meaning of the cases cited. Cf., *Shiver* v. *United States*, 159 U. S. 491, 494; *Boise Forest*, 28 Op. 587, 591, and citations; *Bunker Hill Co.* v. *United States*, 226 U. S. 548, 550. The rule confining "public lands" to lands which are vacant and unclaimed is designed to protect existing claims against later adverse claims. It relates to the time when the later claim is asserted. The act of 1884 in terms relates to existing as well as future locations. As between Taylor and a junior claimant the land would not have been "public," but as between him and the Government it was.

APPENDIX.

DEPARTMENT OF THE INTERIOR,
Washington, May 19th, 1880.

The Honorable the SECRETARY OF THE INTERIOR.

SIR: I have the honor to submit, herewith, for your approval, and subject thereto, for transmission to Congress, a draught of a bill to enable Indians to make homestead entries under the provisions of the act of March 3d, 1875, without payment of fees and commissions, in such cases as the Secretary of the Interior shall judge proper.

The 15th and 16th sections of the act referred to extend the benefits of the homestead act of May 20th, 1862, and the acts amendatory thereof (now embodied in sections 2290–2291–2292, and 2295 to 2302, inclusive, of the Revised Statutes) to any Indian born in the United States, who is the head of a family, or who has arrived at the age of 21 years, and who has abandoned, or who may hereafter abandon his tribal relations, with the exception that the provisions of the 8th section of said act of 1862 (section 2301, Revised Statutes,) which admits of the commuting of homestead to cash entries, shall not be held to apply to entries made thereunder, and with the proviso that the title to lands acquired by any Indian by virtue thereof, shall not be subject to alienation or incumbrance, either by voluntary conveyance, or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor.

The total amount of fees and commissions payable upon homestead entries varies from seven dollars ($7.^{00}_{100}$) to twenty-two dollars ($22.^{00}_{100}$) in proportion to locality and number of acres entered.

The uncivilized or partially civilized Indians, taught to rely upon the Government to supply their daily wants, are naturally improvident, and comparatively few of them are able to command the small amount of money required.

I have the honor, therefore, to recommend that, as an additional incentive to the adoption of civilized habits, where it shall appear to the satisfaction of the Honorable Secretary that the Indian applicant for homestead privileges is acting in good faith, and that he is unable to provide the amount necessary to liquidate the fees and commissions payable thereon, he shall be permitted to make the Homestead entry without payment thereof, in conformity with the provisions of the proposed Bill.

Very respectfully, your obdt. servt.,

R. E. TROWBRIDGE,
Commissioner.

[Inclosure of the above letter.]

An act to admit of Indian homestead entries being made in certain cases without the payment of fees and commissions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for Indians to make homestead entries under the provisions of the act of March 3, 1875, without payment of fees and commissions in such cases as the Secretary of the Interior shall judge proper.

Extracts from reports of the Commissioner of Indian Affairs.

From report for the year 1881, p. XXV:

> On the 19th of May, 1880, my predecessor submitted to the department a draft of a bill to enable Indians to enter land under the provisions of the 15th and 16th sections of the act of Congress approved March 3d, 1875, extending to Indians the benefits of the provisions of the homestead act of May 20th, 1862, and the acts amendatory thereof (now embodied in sections 2290, 2291, 2292, and 2295 to 2302, inclusive), without the payment of the fees and commissions now prescribed by law in such cases. A great many Indians in different parts of the United States are desirous of availing themselves of the benefits conferred by the act of 1875, but owing to their poverty and improvidence few of them can command the amount necessary to pay the fees and commissions required by law. In many instances, more especially the Mission Indians in California and the Spokanes and others in Washington Territory, the Indians and their fathers before them have been residing upon, cultivating, and improving small tracts of land for generations. When these lands are surveyed and brought into market, the Indians, through ignorance of the law and the want of funds to pay the fees and commissions necessary to enter the land occupied by them, fail to take advantage of the benefits of the act of 1875 within the time prescribed by law after filing of the plats of survey in the district land office, the result of which is that white men enter the Indian's land, drive him therefrom, and appropriate his improvements and the fruits of his industry and labor.

A condition precedent to an Indian taking advantage of the act of 1875 is that he must have abandoned his tribal relations. The policy of the Government being to break up tribal relations among the different bands of Indians, and to encourage them to take land in severalty, and to adopt the habits and pursuits of civilized life, they should receive every encouragement in their efforts in that direction.

Until a change in the law as above recommended is made, it is of great importance that the department should have at its disposal a fund that can be used for the payment of entry fees and commissions, and, with that end in view, an estimate for the sum of $5,000 has been submitted.

From report for the year 1882, p. XLIV:

I again invite attention to the necessity of legislation by Congress to enable Indians to enter lands under the fifteenth and sixteenth sections of the act of Congress approved March 3, 1875, extending to Indians the benefits of the homestead act of May 20, 1862 (now embodied in sections 2290, 2291, 2292, and 2295 to 2302, Revised Statutes), without the payment of the fees and commissions now prescribed by law in such cases.

In my report for last year attention was called to the fact that, until a change is made in the law as therein recommended, it is of great importance that the department should have at its disposal a fund that can be used for the payment of entry fees and commissions, and that an estimate for the sum of $5,000 had been submitted with that end in view. No appropriation for that purpose was made. I have again submitted an estimate for the sum of $5,000, and trust that Congress will either amend the law so as to allow Indians

to enter homesteads without cost to them or will make appropriation of the sum estimated for.

From report for the year 1883, p. XVII:

I again, and for the third time, invite attention to the necessity of legislation by Congress to enable Indians to enter lands under the fifteenth and sixteenth sections of the act of March 3, 1875, extending to Indians the benefits of the homestead act of May 20, 1862, without the payment of the fees and commissions now prescribed by law, or to the necessity of placing a fund at the disposal of the department which can be used for such payments. I have again submitted an estimate for the sum of $5,000, and, as stated in my last annual report, I trust that Congress will either amend the law so as to allow Indians to enter homesteads without cost to them or make appropriation of the sum estimated.

[48th Congress, 1st session. Senate. Ex. Doc. No. 35.]

Message from the President of the United States, transmitting a communication from the Secretary of the Interior of the 19th instant, submitting draft of bill to allow Indian homestead entries, in certain cases, without the payment of fees and commissions.

JANUARY 8, 1884.—Read and referred to the Committee on Public Lands and ordered to be printed.

To the Senate and House of Representatives:

I transmit herewith a communication from the Secretary of the Interior of the 19th instant [ultimo], submitting, with accompanying papers, a draft of a bill "to allow Indian homestead entries, in certain cases, without the payment of fees and commissions."

The matter is presented for the consideration and action of the Congress.

CHESTER A. ARTHUR.

EXECUTIVE MANSION, *January 7, 1884.*

DEPARTMENT OF THE INTERIOR,
Washington, December 19, 1883.

SIR: I have the honor to submit herewith for your consideration a report of the 17th instant, from the Commissioner of Indian Affairs, presenting with recommendation a draft of a bill "to allow Indian homestead entries, in certain cases, without the payment of fees and commissions."

The intent of this legislation is to provide for those Indians who may desire to avail themselves of the homestead laws as extended to Indians, but who are unable through poverty to pay the said fees and commissions, which range, according to difference in locations and quantity of land taken, from $7 to $22.

I respectfully recommend that the matter may be transmitted for the consideration and action of the Congress.

I have the honor to be, very respectfully, your obedient servant,

H. M. TELLER, *Secretary.*

The PRESIDENT.

Indian homestead entries.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, December 17, 1883.

SIR: With office report dated May 19, 1880, a draft of a bill to enable Indians to make homestead entries under the provisions of the act of March 3, 1875 (18 Stat., 420), without payment of fees and commissions, in such cases as the Secretary of the Interior might judge proper, was submitted to the department for transmission to Congress but without any favorable result.

The attention of the department has also been called to the importance of this measure in each of my three annual reports.

Annual estimates for the sum of $5,000, to be used for the payment of entry fees and commissions until a change should be made in the law as recommended, have also been submitted but without avail.

The fifteenth and sixteenth sections of the act referred to (March 3, 1875) extend the benefits of the homestead laws, now embodied in sections 2290, 2291, 2292, and 2295 to 2302, inclusive, of the Revised Statutes, to any Indian born in the United States who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or who may hereafter abandon, his tribal relations, except that the right of commuting a homestead to a cash entry is not extended to an Indian, and with a proviso that the title to lands acquired by any Indian by virtue of said act shall not be subject to alienation or incumbrance, either by voluntary conveyance, or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor.

By the fifth section of the act of January 18, 1881 (21 Stat. 317), this period is extended to twenty years from the date of the patent.

The total amount of fees and commissions payable upon homestead entries varies in amount from $7 to $22, in proportion to locality and number of acres entered.

The amount of revenue which would be lost to the Government by permitting the Indians to make entries without the payment of fees and commissions is insignificant, while most of the

Indians who desire to avail themselves of the benefits conferred by the act of 1875, owing to their poverty and improvidence, are unable to command the amount necessary to pay these fees and commissions.

In many instances, more especially the Mission Indians in California and the Spokanes in Washington Territory, they and their fathers before them have been residing upon and cultivating small tracts of land for generations. When these lands are surveyed and brought into market, the Indians, through ignorance of the law and want of funds to pay the necessary fees and commissions, fail to take advantage of the act of 1875, as the result of which white men enter the Indian's lands, drive him therefrom, and appropriate his improvements and the fruits of his industry and labor.

It is a matter of regret that so much difficulty is experienced in securing small appropriations to encourage the Indians to support themselves while large appropriations are annually made to maintain them in idleness. It frequently happens that when an Indian evinces a desire to labor and sustain himself, assistance can not be rendered him for the want of a small appropriation.

That the Indians should be encouraged in all possible ways to throw off their indolent habits and adopt some means of gaining their own support would seem to be too plain to admit of argument. This was undoubtedly the end sought to be reached by the act extending the benefits of the homestead laws to Indians, and any measure which will promote the objects of that act should certainly receive the approval of Congress.

I therefore have the honor to recommend that, as an additional incentive to the adoption of civilized habits, when it shall appear to the satisfaction of the Secretary of the Interior that the Indian applicant for homestead privileges is acting in good faith, and that he is unable to provide the amount necessary to liquidate the fees and commissions payable thereon, he shall be permitted to make the homestead entry without payment thereof, and herewith submit the draft of a bill for that purpose, for transmission to Congress.

I inclose two copies of this report and the proposed bill.

Very respectfully, your obedient servant,

H. PRICE,

Commissioner.

The SECRETARY OF THE INTERIOR.

A bill to allow Indian homestead entries in certain cases without the payment of fees and commissions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever it shall appear to the satisfaction of the Secretary of the Interior that any Indian who desires in good faith to avail himself of the provisions of the fifteenth section of the act of March third, eighteen hundred and seventy-five, extending the benefits of the homestead laws to Indians, is unable to make a homestead entry by reason of poverty, such entry shall be allowed without the payment of the fees and commissions.

[Certified copies of the following unreported opinions will be filed with the clerk.]

In the District Court of the United States for the Southern District of California, northern division.

THE UNITED STATES OF AMERICA, complainants,
vs.
ALEXANDER H. HOGUE ET AL., defendants.
} C. C. No. 253.

Conclusions of the court on demurrer to the bill.

I. The power of Congress to change its restrictions upon alienation of Indian lands is expressly declared by the Supreme Court of the United States in *Marchie Tiger* vs. *Western Investment Company*, 221 U. S. 286; *George Choate et al.* vs. *Trapp et al.*, 224 U. S. 665; and *Heckman et al.* vs. *United States*, 224 U. S. 413.

The following extract is from *Tiger* vs. *Western Investment Company, supra*, at page 316:

[Extract omitted.]

In further amplification of the grounds of said doctrine the following extract from *United States* vs. *Hemmer*, 195 Fed. 790, 805, may be appropriately quoted:

[Quotation omitted.]

II. The act of 1884 is, in effect, an amendment to, or substitute for, the act of 1875 (*United States* vs. *Hemmer, supra; Great Northern Railway Company* vs. *United States*, 155 Fed. 945), and the restriction of twenty-five years contained in the former act is applicable here. It may be added that the executive department of the Government has also placed the same construction upon the act of 1884. (Opinions of Attorneys General, vol. 19, p. 166.) Said restriction applies, although not inserted in the patent. (*Taylor* vs. *Brown*, 40 N. W. Rep. 525, and 147 U. S.

640; *Eels* vs. *Ross*, 64 Fed. 417, 420; *Frazee* vs. *Spokane County*, 69 Pac. Rep. 779; *United States* vs. Hemmer, 195 Fed. 790.)

United States vs. *Saunders*, 96 Fed. 268, on which defendants rely, is unsatisfactory in its reasoning and conflicts with the authoritative decisions above cited.

III. The right of the United States to sue in cases such as the one at bar is well settled. [Citing cases.]

IV. The Indian grantor is not a necessary party. (*Heckman* vs. *United States, supra.*)

[The remainder of the opinion deals with the statute of limitations and is hence omitted as irrelevant.]

In the District Court of the United States for the Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA, COMPLAINANTS, *vs.* PETER E. WALLINE, DEFENDANT.	No. 29, Civil.

Conclusions of the court on demurrer to the bill.

The only difference between *United States* vs. *Hogue et al.*, wherein my conclusions on demurrer to the bill were this day filed, and the case at bar is, that in the former case final proof was made after the passage of the act of July the 4th, 1884, while in the latter final proof was made more than five years before the passage of said act.

The doctrine upon which the *Hogue case* rests is, that Congress, at any time before the period of restriction on alienation expires, has power to extend said period in the promotion of what it deems the best interests of the Indian, and whatever title, legal or equitable, the Indian acquires before the expiration of this period is subject during its continuance

to said power of extension. Obviously, therefore, it is immaterial whether the final proof was made before or after the passage of the act of 1884.

I am not unmindful that there are contrary expressions in *United States* vs. *Saunders*, 96 Fed. 268; *United States* vs. *Hemmer*, 195 Fed. 790; *Frazee* vs. *Spokane County*, 69 Pac. Rep. 779, 782; and *Frazee* vs. *Piper*, 98 Pac. Rep. 760. These expressions, however, except in the *Saunders case*, are dicta, and can not prevail over the Supreme Court decisions, on which my conclusions, above mentioned, in the *Hogue case*, were rested.

The demurrer will be overruled, and defendant assigned to answer within thirty days.

(Signed) OLIN WELLBORN,
Judge.

In the District Court of the United States for the Eastern District of Washington, Southern Division.

UNITED STATES OF AMERICA, plaintiff, *vs.* LYLE LIGHT, POWER & WATER COMPANY, a corporation, defendant.	No. 293. In equity. Opinion.

Oscar Cain, U. S. atty.
Edmund J. Farley, asst. U. S. atty.
Stapleton & Sleight, for defendant.

RUDKIN, *District Judge:* By consent of parties, the present suit has been submitted to the court for final decree on bill and answer. The facts, so far as deemed material, are as follows:

On the 3rd day of December, 1881, Little Dave, a Klickitat Indian, who had theretofore abandoned his

tribal relations, made homestead entry of the southeast quarter of section twenty-six, township three, north of range twelve, E. W. M., in Klickitat County, under the act of March 3, 1875 (18 Stat. 402), which provides as follows:

> That any Indian born in the United States, who is the head of a family or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations, shall, on making satisfactory proof of such abandonment, under rules to be prescribed by the Secretary of the Interior, be entitled to the benefits of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twentieth, eighteen hundred and sixty-two, and the acts amendatory thereof, except that the provisions of the eighth section of the said act shall not be held to apply to entries made under this act:
>
> *Provided, however,* That the title to lands acquired by an Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor.

Thereafter, the exact date not appearing, the entryman died. On the 28th day of May, 1888, his widow, Emma Dave, made final proof, and on the 4th day of February, 1890, received letters patent. The patent erroneously contained the restriction against alienation prescribed by the act of January 18, 1881 (21 Stat. 315), which was applicable only to the Winnebago Indians of Nebraska and Wisconsin. On the 22nd day of May, 1911, the patentee leased to one D. E. Keasey a portion of the patented premises

lying along the bank of the Klickitat River, together with the right to construct a dam in the river, reserving to herself certain rights of fishery, and the rights thus acquired by Keasey were later transferred to the defendant company. Thereafter the Northwestern Electric Company, a corporation, instituted condemnation proceedings in the Superior Court of Klickitat County, of this State, under the act of March 3, 1901 (31 Stat., 1084), against Emma Dave, the patentee and the defendant herein, to condemn and appropriate the rights of the patentee and the defendant in certain portions of the patented premises. On the 8th day of August, 1911, final judgment was entered in the condemnation suit, awarding to the plaintiff, Emma Dave, the sum of $4,000, and to the defendant, the Lyle Light, Power & Water Company, the sum of $2,500, as the value of their respective interests in the land so appropriated. These several sums have been paid, and the present suit was instituted by the Government as trustee and general guardian of the Indian to cancel the lease or grant to Keasey and to recover the sum of $2,500 awarded to the defendant.

It is conceded by both parties that the twenty-year restriction against alienation contained in the patent is void, and the first question presented for decision is the effect of this error upon the Indian title. The act of Congress of July 4, 1884 (23 Stat., 96), supplemental to the act of March 3, 1875, *supra*, provides as follows:

> That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate, may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by

> citizens of the United States; * * * All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs, according to the laws of the State or Territory where such land is located, and at the expiration of said period the United States shall convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

The plaintiff contends that the provisions of the act of 1884 should be read into this patent, in lieu of the erroneous provision from the act of 1881, and that all transfers or conveyances made before the expiration of the twenty-five year period from the date of patent are null and void. The defendant, on the other hand, contends that the erroneous restriction should be rejected entirely, thus granting to the Indian an indefeasible title free from any restrictions whatsoever, or at most that the five-year period prescribed by the act of 1875 should be read into the patent, and that this period had elapsed long before the transfers complained of were made.

Without discussing the questions thus presented at length, my conclusions are as follows:

First. That the grant to the widow is subject to the restraint against alienation contained in the act of 1884 which was in force at the time of final proof and patent, and that the omission of this restriction from the patent by the ministerial officers of the Government is not material and does not add to or change the character of the Indian title.

Second. That the Government as holder of the legal title and trustee for the Indian has a right to maintain this action. In no other way can it fulfill its promise to convey the land to the Indian or his widow and heirs, in fee, discharged of said trust and free from all charge or incumbrance whatsoever at the expiration of the trust period.

Third. That the Government is not estopped to maintain this action either by the void grant or by the judgment in the condemnation proceeding to which it was not a party. To hold otherwise or to permit offsets against the amount of the award in the condemnation proceeding would permit parties to accomplish by indirection what the law expressly forbids them to accomplish directly.

A decree will therefore be entered according to the prayer of the complaint.

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BRIEF FOR THE APPELLEES

In the Supreme Court of the United States

OCTOBER TERM, 1915.

No. 86

THE UNITED STATES

vs.

LOUIS HEMMER, WILLIAM W. FLETCHER, J. E. PEART, ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

LEWIS BENSON and GEORGE RICE,
Solicitors for Appellees.

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In the Supreme Court of the United States

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THE UNITED STATES

vs.

LOUIS HEMMER, WILLIAM W. FLETCHER, J. E. PEART, ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE APPELLEES.

STATEMENT OF THE CASE.

The above action was commenced in the District Court of the United States for the District of South Dakota and submitted and determined in that court upon an agreed statement of facts. (R. 18, f. 32), from which it appears:

That on the 7th day of October, 1878, one Henry Taylor, made a homestead entry for the land in controversy.

That he was a full-blooded Sioux Indian and a member of the Santee Sioux band of Indians and not a member of the Winnebago band of Indians and never had any connection with said Winnebago Indians.

That he was born in the United States, was over the age of twenty-one years and had abandoned his tribal relations.

That immediately after making such homestead entry said Taylor entered upon said land and established a residence thereon, and resided thereon for a period of five years and made satisfactory proof thereof to the commissioner of the general land office.

That on the 6th day of December, 1884, said Taylor made his final proof to the commissioner of the general land office that he had complied with the homestead law. (R. 19, f. 33, Exhibit A.-R. 32.)

That patent for said land was issued to said Taylor June 6, 1890. (R. 20.)

That Taylor continued to own and occupy said premises until the 8th day of August, 1908, when he and his wife made and entered into a contract with one J. E. Peart for the sale and conveyance thereof. (R. 21.)

That on the 8th day of December, 1908, said J. E. Peart assigned said contract to Defendant, William W. Fletcher. (R. 23.)

That after the execution of the contract Taylor and his wife took possession of the property to be conveyed to him under the terms thereof and Peart's assignee took possession of the Taylor land, (R. 23), and has since remained in possession thereof.

That Taylor refused to make conveyance of the land.

That an action was commenced in the District Court by Peart's assignee for the specific performance of the contract; judgment rendered for plaintiff, and a commissioner was appointed to make conveyance for Taylor, which conveyance was afterward made. (R. 23.)

No question is raised, or has ever been raised, as to the fairness of the contract, or that Peart and his assignee have not fully kept and performed the same.

The trial court states in its opinion:

> "It is admitted that Peart and his assignee fully complied with all the terms and conditions of the contract referred to, and was entitled to said decree if Taylor's title was such that he could make legal conveyance of the land." (R. 87.)

The land after five years from date of the issuance of the patent was regularly taxed by the taxing officers of the County of Moody.

The porpose of the present action is to cancel the contract between Peart and Taylor, the assignment of the contract from Peart to Fletcher, the judgment of the United States District Court decreeing specific performance of said contract by the court commissioner to Fletcher, and the deed from Fletcher to Hemmer, and to cancel and enjoin the collection of all taxes levied upon said land.

The trial court found all issues in favor of the government.

The defendants appealed to the Circuit Court of Appeals and the judgment of the trial court was reversed.

Opinion of District Court Reported 195 Fed. 790.

Opinion of Circuit Court of Appeals reported 204 Fed. 898.

The real controversy in this case is whether Taylor acquired title to and was entitled to a patent under the provisions of the Act of Congress approved March 3, 1875, without other limitations as to alienation than therein provided, as contended by the defendants and appellees, which statute is as follows:

> "That any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon his tribal relations, shall, on making satisfactory proof of such abandonment, under the rules to be prescribed by the Secretary of the Interior, be entitled to the benefits of the act entitled 'An Act to secure homesteads to actual settlers on the public domain,' approved May 20th, eighteen hundred and sixty-two, and the acts amendatory thereof, except that the provisions of the eighth section of the said act shall not be held to apply to entries made under this act; Provided, However, That the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor; Provided, That any such Indian shall be entitled to his distributive share of all annuities, tribal funds, lands and other property, the same as though he had (maintain) his tribal relations; and any transfer, alienation, or incumbrance of any interest he may hold or claim by reason of his former tribal relations shall be void." 18 Stat. 420.

Or whether his title to said land is controlled by the Act of Congress approved July 4, 1884, which statute is as follows:

> "That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior or otherwise, hereafter, so locate, may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selection of homesteads and the necessary proofs

at the proper land offices one thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever." (23 Stat. 96.)

It has never been contended by either party that the Act of Congress of June 18, 1881, is controling. That act only applied to Winnebago Indians.

ARGUMENT.

TAYLOR ACQUIRED TITLE TO THE LAND UNDER ACT OF CONGRESS, APPROVED MARCH 3, 1875.

The only law in force at the time Taylor made his entry, and upon to long subsequent to the time that he had fully complied with the law and was entitled to his patent, contained no trust provision. It is a well settled maxim, as applicable to the government as to an individual, that "equity regards that as done which should have been done." Taylor was entitled to his patent before the enactment of the law of July 4, 1884.

> "The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants."
>
> *Stark vs. Starr*, 6 Wall. 402.
>
> 73 U. S. 402, 418. Book 19 L. Ed. 925, 929.
>
> *Barney vs. Dolph*, 97 U. S. 652, 24 L. Ed. 1063.

At the end of the five years residence, Taylor's Patent was completely earned. The issuing of the Patent is a mere ministerial act.

Stoddard vs. Chambers, 2 How. 284.

We quote from a recent case:

"The execution and delivery of the patent after the right to it is complete, are the mere ministerial acts of the officer charged with that duty."

"In *Simmons vs. Wagner*, 101 U. S. 260, 261; 25 L. Ed. 910, 911, the Chief Justice repeated the proposition in these words.

"'Where the right to a Patent once vested in a purchaser of public lands, it is equivalent as far as the Government is concerned, to a Patent actually issued. The execution and delivery of the Patent after the right to it has become complete, are the mere ministerial acts of the officer charged with that duty.'"

Ballinger vs. U. S., 216 U. S. 240.

Barney vs. Dolph, 97 U. S. 652; 24 L. Ed. 1063.

THE STATUTE OF 1875 HAS NOT BEEN AMENDED OR REPEALED.

It is not necessary to indulge in fine theories to demonstrate that the Patent to the land in question was issued under and pursuant to the statute of 1875, for that statute has at all times since its passage been, and now is, in full force and effect. The Act of July 4, 1884, contains no repealing clause, and it is a well settled rule of law that repeals by implication are not favored.

"The general words of another and later statute shall not repeal the provisions of a former one. And, if in the same act of Parliment, there be one clause which applies to a particular case, and another which is conceived in general terms, the former shall not restrain the signification of the latter."

Potter's Dwarris on Statutes and Constitution 110.

"The American authorities are substantially to the same effect. A statute can be repealed, only by an express provision of a subsequent law, or by necessary implication. To repeal a statute by implication, there must be such a positive repugnancy between the provisions of the new law and the old, that they cannot stand together, or be consistently reconciled." Id 154.

There is nothing incompatable or in any manner inconsistent in the two statutes. In fact, it takes both statutes to

cover the various exigencies that may confront an Indian attempting to acquire a homestead.

The Act of 1875 makes it necessary that the Indian should have abandoned his tribal relations before entering a homestead, and that he should be the head of a family, or arrived at the age of twenty-one years, and *born* within the United States, to entitle him to enter land under the general homestead law, and after compliance with such law, the government grants him a fee title, subject to a prohibition against alienation for five years.

The Act of July 4, 1884, provides:

> "That such Indians as may *now be located* on public lands, or as may under the direction of the Secretary of the Interior, or otherwise, hereafter so locate may avail themselves of the provisions of the homestead laws."

As Taylor's title was completed before the Act of Congress creating the trust, went into effect, the United States has no interest in the land and no standing in court.

Taylor made his original entry October 7, 1878. (R. 19.)

> "That immediately after making such homestead entry said Taylor entered upon said land and established a residence thereon, and resided thereon for a period of five years, and made satisfactory proof of all of the aforesaid facts to the commissioner of the general land office."

Agreed Statement of Facts (R. 19, Sub. Div. 4.)

It will thus be seen that Taylor was entitled to his Patent October 7, 1883, and that his rights to the land were governed by the law existing at that time.

The court below found that Taylor made actual settlement June 9, 1879. This would complete his five year residence June 9, 1884, nearly one month before the enactment of the statute under which the Government claims title to the land. We have never understood the basis of the court's finding as it is contrary to the agreed statement of facts, (R. 19, Sub. Div. 4), but taking the date as found by the court, Taylor's Patent was earned June 9, 1884.

Surely the principal virtue is in the actual residence, cultivation and improvement upon the homestead claim, and not in the formal proof. The proof is no part of the consideration moving to the Government, but it is necessary to satisfy

the Government that such consideration has been performed. That this was the intention of Congress is evidenced by the fact that Congress permitted the proof to be made at any time between the expiration of the five years residence and the expiration of seven years from the date of entry, allowing two years after the requirements had been complied with, in which the applicant might go through the formality of making proof of what he had done during the five years. The requirements are absolutely at an end at the expiration of the five years. There are no requirements whatever imposed upon the homesteader during the two years in which he may make his proof. It is not necessary that the applicant should reside upon the land, or do any other act at all in relation thereto. This can mean nothing but that his right to a Patent at the expiration of five years is completely earned.

The only purpose of the proof is to show that the claimant has fully complied with the law, and has earned his Patent.

The Act of 1875 contemplates the granting of homesteads to Indians of a semi-civilized state. The Act of 1884 throws the door open for the blanket Indians as well, past the required age limit. Under the Act of 1875, Congress recognizing the civilized stage of the Indian, proof of which must have been submitted before the entry, limited the time to five years, during which the homesteader might not alienate or otherwise dispose of his homestead.

Under the statute of 1884 the Government does not grant a fee title to the entryman upon proof of compliance with the homestead law, but holds the legal title to said land in trust for a period of twenty-five years thereafter, because in the latter instance the guardianship of the government was deemed necessary for a much longer period, owing to the uncivilized stage of the Indians that would be qualified to acquire homesteads under that statute.

Under the statute of 1884 it was not necessary that the Indian should have been born within the United States, or that he should have abandoned his tribal relations. Counsel for the Government suggests that under the later act, an Indian who is not twenty-one years of age might enter a homestead. That is not so. Under the general homestead law, an entryman must make an affidavit that he is over twenty-one years of age, or the head of a family. The Indian would have to do the same, but he would not have to make an affidavit that he was born in the United States, or that he had abandoned his tribal relations.

"Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one sui juris. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned."

Re Heff, 197 U. S. 499; 49 L. Ed. 853.

The foregoing language was quoted with approval by Justice Brewer in

United States v. Celestine, 215 U. S. 290; 54 L. Ed. 199.

Congress had a right to assume, and undoubtedly did, that an Indian who had abandoned his tribal relations had reached a higher stage of civilization than one who refused to abandon such relation. Congress had a right ,and it was reasonable it should discriminate between Indians born within the United States and those born without the United States.

"That citizenship is limited to the allottees born within the territorial limits of the United States was obviously intended to exclude from that privilege such allottees, if any there should be, who had recently come into this country from the Dominion of Canada or elsewhere."

Re Heff, 197 U. S. 490 at 503. 49 L. Ed. 848 at 855.

We insist that there is nothing inconsistent between the two Acts of Congress; that the Act of 1875 was express legislation for certain classes of Indians, and that it is not repealed, amended or modified by any subsequent legislation that is in general terms.

"Where Congress has expressly legislated in respect to a given matter that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any mere inference or implication to be found in such subsequent legislation."

Rosecrans v. U. S., 165 U. S. 257, Book 41 L. Ed. 708.

"Repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them."

U. S. vs. Greathouse, 166 U. S. 601 at 605. Book 41 L. Ed. 1130.

Taylor comes within the express provision of the statute of 1875, and has complied with all of its terms, but he does not come within the letter or spirit of the statute of 1884. That statute is confined to such Indians as "may now be located on public lands, or as may under the direction of the Secretary of the Interior, or otherwise, hereafter so locate."

TAYLOR WAS NOT AT THE TIME OF THE ENACTMENT OF THE STATUTE UNDER WHICH THE GOVERNMENT CLAIMS "LOCATED ON PUBLIC LANDS."

Taylor was not at the time said statute was enacted located upon public land, nor is there anything in the record showing that he has at any time subsequent to that enactment located upon public land. When Taylor made his original homestead entry, that land ceased to be "public lands."

"That whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it."

Wilcox vs. Jackson, 13 Pet. 498 at 513. Book 10 L. C. P. 264 at 271.

"In *Wilcox vs. Jackson*, 13 Pet. 498, the President, by Proclamation, had ordered the sale of certain lands, without excepting therefrom a military reservation included within their boundaries. The proclamation was based on an Act of Congress supposed to authorize the sale of these lands, but the Court held that the Act did not apply to the case, and they say: 'We go further and say that whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law, proclamation, or sale would be construed to embrace or operate upon

it, although no reservation were made of it.' It may be said that it was not necessary for the court in deciding the question to pass upon this question; but however this may be, the principle asserted is sound and reasonable, and we adopt it as a rule of construction. And the Supreme Courts of Wisconsin and Texas in cases where the point was necessarily involved, have also adopted it. *State v. Delesdenier*, 7 Tex. 76; *Spaulding v. Martin*, 11 Wis. 274."

Leavenworth etc. R. R. Co. vs. United States, 92 U. S. 733; Book 23 L. C. P. 634 at 639.

"The right to a Patent once vested is treated by the Government when dealing with the public lands as equivalent to a patent issued."

Stark vs. Starr, 73 U. S. 418; Book 18 L. C. P. 925, 929.

The language is quoted with approval by Justice Brewer in *Mann vs. Tacoma Land Co.*, 153 U. S. 273, 286.

"It is thus seen that when the grant to the Northern Pacific Railroad Company was made, on the 2d day of July, 1864, the premises in controversy had been taken up on the pre-emption claim of Robinson, and that the pre-emption entry made was uncancelled; that by such pre-emption entry the land was not at the time a part of the public lands; and that no interest therein passed to that company. The grant is of alternate sections of public land, and by "public land" as it has long been settled, is meant such land as is open to sale or other disposition under general laws. All land, to which any claim or rights of others have attached, does not fall within the designation of 'public lands.' "

Bardon vs. Northern Pac. Ry. Co., 145 U. S. 535.

"It is to be observed that although the words of the Act of December 15th, 1880, are broad enough, if literally interpreted, to embrace all the land within the abandoned Fort Dodge military reservation north of the Atchison railroad, there are no words in it of express repeal of any former statute. It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it

must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore to displace the prior statute. *McCool v. Smith*, 66 U. S. 1 Black 459, 468 (17:218-221); *United States v. Tynen*, 78 U. S. 11 Wall. 88, 93 (20:153, 154); *Red Rock v. Henry*, 106 U. S. 596, 601 (27:251, 253); *United States v. Three hundred and fifty-six Caddies of Tobacco*, 78 U. S. 11 Wall. 652 (20:235); *King v. Cornell*, 106 U. S. 395, 396 (27:60)."

Frost vs. Wennie, 157 U. S. 47; Book 39 L. C. P. Ed. 615 at 619.

Justice Lamar, in speaking of this subject after quoting and citing former decisions of the Supreme Court of the United States, said:

"And the court further held that this applies as well to homestead and pre-emption as to cash entries. In either case, the entry being made and the certificate being executed and delivered, the particular land entered thereby becomes segregated from the mass of public lands and takes the character of private property."

Hastings & D. R. Co. vs. Whitney et al., 132 U. S. 357; 33 L. Ed. 363.

See also:

Hedges et al. vs. Calcon, 193 U. S. 192; 48 L. Ed. 677.

The decision of the trial court seems to have been based entirely on an erroneous view as to what is public lands. We quote from the opinion:

"The first provision of the law of 1884 is 'That such Indians as may now be located on public lands—' The Act of Congress of March 3, 1875, was the only statute in existence at that time giving an Indian the right to locate on public lands.

"In other words, at the time of the enactment of the law of 1884 all Indians then located on public lands were so located under and by virtue of the provisions of the Act of March 3, 1875. Of necessity, therefore, the law making body must have had in mind those Indians that had taken advantage of the Act of 1875 when in the

very beginning of this statute they refer to 'such Indians as may now be located on public lands.'" R. 88.

Counsel for the Government now insists that the statute above referred to was enacted in compliance with the recommendation of the Department of the Interior and sets forth in full such recommendation. (Government Brief, p. 50.)

We quote from the recommendation:

> "In many instances, more especially the Mission Indians in California and the Spokane in Washington Territory, they and their fathers before them have been residing upon and cultivating small tracts of land for generations. When these lands are surveyed and brought into market, the Indians, through ignorance of the law and want of funds to pay the necessary fees and commissions, fail to take advantage of the Act of 1875, as the result of which white men enter the Indian's lands, drive him therefrom, and appropriate his improvements and the fruits of his industry and labor."
>
> Government Brief page 52.

In none of the documents set forth by counsel has the Interior Department made any reference to changing the law as effecting Indians that had taken advantage of the statute of 1875, but does recommend that legislation be had making it easier for other Indians to acquire homesteads, and while it is not stated in so many words, it must be presumed that the Indians referred to in this quotation above were Indians that had not abandoned their tribal relations and were therefore not entitled to the benefits of the statute of 1875.

It is well known to every one who has been familiar with the Indians of the west that many were located upon public land to which the Indian neither individually nor as a tribe had any title, right or claim by treaty or otherwise. It was for the benefit of such Indians, and for those not born in the United States, that the statute of 1884 was enacted.

At no time since the Act of 1884 became a law could Henry Taylor make a homestead entry. To do so, he would have had to make an affidavit that he had not theretofore made a homestead entry, which he could not truthfully have done. That statute conferred no rights upon him, and it imposed no restrictions.

Judge Elliott's statement that Taylor was located on "public lands" is contrary to every decision of the Supreme Court

of the United States where the word "public lands" has been defined. Let us quote further from the statutes and see what it is that "such Indians as may now be located on public lands" can do. The statute says: "May avail themselves of the provisions of the homestead laws as fully and to the same extent as may be done by citizens of the United States." Taylor could not avail himself of the provisions of that statute. He could not enter land under the homestead law. He had made one entry, and the homestead law limited the right to one entry. If he attempted to file an entry under the later law, he would have had to make an affidavit that he had not theretofore made a homestead entry. To say that Congress intended to confer the right on a person to do that which they already had a right to do, and which they had already done, and which they could not again do without committing perjury, does not rise above the absurd.

THE TRUST PROVISION OF THE STATUTE OF 1884 ONLY APPLIES TO ENTRIES MADE UNDER THAT ACT.

There is nothing in the reading of the statute to indicate that the statute is intended to be in any way supplemental to, or an amendment of, the statute of 1875. It is entirely prospective in its terms and not retrospective. It was evidently intended to cover a class of Indians who could not qualify under the law of 1875. Counsel attempts to make much of the fact that the law of 1884 makes no restriction as to Indians born in the United States, or as to age, etc., but all those provisions are found under the general homestead law of 1862. (R. S. 2289). It is one of the qualifications under that statute that the entryman should be a citizen of the United States, or have declared his intention to become a citizen of the United States.

Whether it is a matter of such universal knowledge and importance that the court will take judicial notice of it or not it is a fact that the law of 1875 was enacted through the efforts of the Indian Rights Association and especially the efforts of John P. Williamson, a Missionary among the Sioux Indians. He had taken a number of Indians from Minnesota to Flandreau. These Indians made modified forms of the affidavit required by aliens making a declaration of their intention to become citizens of the United States. They thereupon made homestead entries. This was before the law of 1875 was enacted and is the reason for the provision in that law legalizing homestead entries previously made. These so-called Flandreau Indians were a part of the Indians,

or relatives of the Indians, who had been engaged in the Minnesota Indian war of 1862. Subsequently they were converted to the Christian religion; became members of the Presbyterian or Episcopal churches; abandoned their tribal relations; adopted the names of civilized people; were married under the rites of the church and in accordance with the laws of the Territory of Dakota. Their marriages were registered not only in the churches but in the public records of the county. For many years after the massacre they received no annuities from the government. At the time of the so-called massacre or Indian war, or immediately following it, many of these Indians went to Canada. While there many children were born to them, and after the enactment of the law of 1875 many of these were unable to make homestead entries because they were not born within the United States. Doctor Charles Eastman, who has obtained more fame in literature than any other full-blood Indian in the United States, went with his family, or a part of his family, to Canada and was afterward brought back.

After the Indian battle usually known as the Custer Massacre, Sitting Bull and his band of Indians went to Canada and remained there for sometime. During that time many children were born to them in Canada, who were also disqualified for making a homestead entry under the law of 1875. The Indians, as nomadic people traveling from place to place for the purposes of hunting, trapping, etc., and especially in following the buffalo herds, were many times across the boundary line in Canada and many children were born there. It was for the purpose of giving Indian children born in Canada, and the Indians belonging to tribes that had not abandoned their tribal relations, like the Sitting Bull band of Indians, and many other Indians to the further west the right to acquire homesteads that the law of 1884 was enacted. In none of the public documents to which counsel for the Government has called the Court's attention is there one word implying that the five year limitation in the law of 1875 is not amply sufficient for all Indians who were qualified to make homestead entry under that law. Even though the Court does not take judicial notice of the facts above stated, it can well presume that such facts may have existed and that Congress had such facts in mind when it enacted the law of 1884.

It does not appear to us that the Court should presume that the framers of our laws would be so careless in the use of language had they intended to modify the law of 1875 or to put an additional restriction upon the alienation of the

land acquired under that law that they would not have at least made some reference to the statute.

Counsel for the Government in substance says that the only difference between the two statutes is that one requires the abandonment of the tribal relations and the other does not. This is the real and greatest difference between a civilized and an uncivilized people, and why should Congress not have made the distinction between these two classes of Indians?

THE EQUITIES OF THE CASE.

The question of estoppel and the equity of the case and in fact all other questions are so fully covered by Justice Sanborn's opinion that we deem it presumptious on our part to use as much space as we have in their discussion, but we call the Court's attention to the undisputed facts that the Indian, Taylor, received the full value of his land; that the defendants have fully kept all of their contract; that they made the contract after the Executive Department of the Government had advised that the Indian had a right to sell and had recommended that he sell the land.

See "Exhibit H" R. 46.
"Exhibit H-2" R. 47.
"Exhibit H-3" R. 49.
"Exhibit H-4" R. 51.

The Judicial Department of the Government had decided that the contract between Taylor and Peart was valid and binding and that Taylor be compelled to make conveyance of the land.

See decree of Court in the case of *Fletcher v. Taylor*, R. 5.

Counsel for the Government contend that the Court below did not take into consideration the rights of Taylor, but counsel seems absolutely to ignore the rights of Hemmer. If some citizen of the United States stood in the same relation to some foreign Government that Hemmer does to the United States, this Government would undoubtedly deem itself in duty bound to protect its citizen with all the power that it possessed as a Government. What more could Hemmer have done to have protected his rights than he did do? What wrong has he or his immediate grantors committed that they should be deprived of the fruits of their labor?

AS TO TAXES.

It follows as a matter of course that if the land was alienable after five years from the date of the issuance of the patent, it was also taxable. Taylor is and was a citizen of the United States, entitled to all the benefits and privileges of other citizens, including the right to send his children to school and receive all the benefits that any other tax payer received. There is no sound reason in fact why he should not pay his just share of the public burden.

THE DISPOSAL OF THE PUBLIC LAND IS A CONGRESSIONAL AND NOT A JUDICIAL QUESTION.

Much of the argument of counsel for the Government would be appropriate before a Congressional Committee but should have no weight with the Court. It is not a question as to the wisdom of either statute now under consideration. It may be that it would have been for the best interest of the Indian to have extended the time of non-alienation from five years to twenty-five years but that matter was for Congress to decide and not the courts. It is much easier to decide such questions after the experiment has been tried than before. However, a full investigation would probably show that as large a percentage of Indians who availed themselves of homestead privileges under the law of 1875 retained the ownership thereof as of the original white settlers who made homestead entry. Many of the latter class during the periods of abundance of the public domain only remained upon their homestead claims until such time as they could be sold. Ownership of land was not appreciated by the white man any more than by the red man. No other property could be so easily acquired. Its value was only appreciated after the public domain was exhausted.

Respectfully submitted,

LEWIS BENSON and
GEORGE RICE,
of Flandreau, South Dakota,
Solicitors for Appellee.

the rule has been established that such lands are not regarded as public lands under acts of Congress passed thereafter.

Nothing in the legislative history of the act of July 4, 1884, indicates that it was passed as an amendment to the act of March 3, 1875, or that Congress deemed the earlier act did not sufficiently protect the Indians in their retention of homesteads entered thereunder.

204 Fed. Rep. 898, affirmed.

THE facts, which involve the construction of statutes relating to the right of Indians to make homestead entries on the public lands, are stated in the opinion.

Mr. Ernest Knaebel for the United States.

Mr. Lewis Benson and *Mr. George Rice* for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This suit was brought in the Circuit Court of the United States, Eighth Judicial Circuit, District of South Dakota, Southern Division, by the United States to remove clouds from the title to certain described lands and to cancel certain instruments purporting to convey the lands and praying that a certain judgment against the lands be declared no lien thereon, the ground of suit being that the conveyances and the judgment were obtained in opposition to the restrictions upon the alienation or encumbrance of the lands imposed by Congress.

After issue joined and hearing had, the District Court, successor of the Circuit Court, entered a decree in accordance with the prayer of the bill. 195 Fed. Rep. 790. The decree was reversed by the Circuit Court of Appeals and the case remanded to the District Court with directions to dismiss the bill. 204 Fed. Rep. 898. This appeal was then prosecuted.

The facts are the following: One Henry H. Taylor,

known and designated sometimes as Henry Taylor, is and was during the times with which the suit is concerned a Sioux Indian of the full blood, belonging to and a member of the Santee Sioux Band of Indians and is not a member of and has never had any connection with the Winnebago Band of Indians.

On October 7, 1878, Taylor entered upon the lands as a homestead, they being part of the public domain and subject to entry under the homestead laws of the United States then in force. He established and continued his residence and made satisfactory proof of all facts required by law.

On June 6, 1890, a patent was issued to him which recited among other things that it was granted upon the express condition that the title conveyed thereby should not be subject to alienation or encumbrance either by voluntary conveyance or by judgment, decree or order of any court or subject to taxation of any character, but should remain inalienable and not subject to taxation for the period of twenty years from the date thereof, as provided by act of Congress approved January 18, 1881, c. 23, 21 Stat. 315. This act applied only to Winnebagoes.

Taylor continued to own the land until August 8, 1908, when he and his wife made a contract with J. E. Peart, one of the appellees, by which they agreed to convey the land to Peart in fee simple by warranty deed for the sum of $2,400, certain land to be accepted in payment of $550 of such consideration. Time was made the essence of the contract and it was made binding upon the heirs, executors, administrators and assigns of the parties.

September 8, 1908, Peart assigned the contract to William W. Fletcher, also one of the appellees herein. After this contract Taylor and wife took possession of the land taken in part payment of the consideration and Peart took possession of the homestead land and paid the consideration in full.

Taylor and his wife refused to convey the homestead land to either Peart or Fletcher, and the latter instituted suit against them to compel specific performance, which suit resulted in a decree compelling such performance, and a deed was executed to Fletcher by a commissioner appointed by the court.

February 5, 1909, Fletcher conveyed the land by warranty deed to Louis Hemmer who, in April, 1909, denied possession to Taylor, who attempted to remove with his family back on the land, and has since denied possession to him.

June 10, 1909, the United States issued a patent to Taylor which recited that he had established a homestead upon the land in conformity with the act of Congress of July 4, 1884 (hereinafter set out), and that therefore the United States, in consideration of the premises and in accordance with the provisions of said act of Congress, did and would hold the land (it was described) for the period of twenty-five years in trust for the sole use and benefit of Taylor, or, in case of his decease, of his widow and heirs, according to the laws of the State where the land was located, and at the expiration of that period would convey the same by patent to Taylor, or his widow and heirs, in fee, discharged of the trust and free of all charge or encumbrances whatsoever. It was declared that the patent was issued in lieu of one containing the twenty-year trust clause dated June 6, 1890, which had been canceled.

In 1894 and in every year since the county treasurer of Moody County (appellee Henderson), its auditor (appellee Hornby), and board of county commissioners have assessed the land for taxation and levied taxes against it and have caused it to be sold and are asserting the right to tax the same. The other appellees assert interest in the land under tax sales.

It will be observed that Taylor made his preliminary

homestead entry October 7, 1878, by virtue of the provisions of the act of March 3, 1875, c. 131, 18 Stat. 402, 420.[1] The act gave Taylor, as an Indian having the qualifications it described (that is, who was born in the United States, was twenty-one years of age, the head of a family and who had abandoned his tribal relations) the benefits of the homestead law and provided that the title acquired by virtue of its provisions should not be subject to alienation or encumbrance, either voluntarily made or through proceedings in court, and should "remain inalienable for the period of five years from the date of the patent issued therefor."

Taylor, however, did not make his final proof until December 11, 1884, when he paid the final fees and received his final receipt and certificate. Prior to such final proof and compliance with the homestead laws Congress passed the act of July 4, 1884, c. 180, 23 Stat. 96. It provided "that such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate may avail themselves of the provisions of the homestead laws . . . ; but no fees or commissions shall be

[1] "SEC. 15. That any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations, shall, on making satisfactory proof of such abandonment, under rules to be prescribed by the Secretary of the Interior, be entitled to the benefits of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twentieth, eighteen hundred and sixty-two, and the acts amendatory thereof, except that the provisions of the eighth section of the said act shall not be held to apply to entries made under this act: *Provided, however*, That the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor: . . ."

charged on account of such entries or proofs. All patents therefor shall be of the legal effect and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or in case of his decease, of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever."

Whether the patent to Taylor should have issued under that act and subject to its restriction of twenty-five years, or under the act of 1875 and with a limitation upon alienation of five years, is the controversy in the case. The Government contends for the act of 1884 and the contention had the support of the District Court. Appellees contend for the application of the act of 1875 and the Circuit Court of Appeals approved the contention. We put to one side the act of 1881, which prescribes a period of non-alienation of twenty years, as it is conceded that the act applied only to Winnebagoes, and Taylor is a Sioux.

The question in the case, then, is the simple one: Which act applied to and determined Taylor's rights? Or, to state the question differently and at the same time give the test of its solution, Was the act of 1875 repealed or superseded by the act of 1884? There are no repealing words in the latter act and if it repealed the other act it must have done so by implication. The implication of such an effect is not favored and the character of the act rejects it. Unquestionably the act of 1884 is the more general and it has criteria of application different from that of the act of 1875. The acts, therefore, have different objects. Under the act of 1884 Indians located on the

public lands at the passage of the act or that might under the direction of the Secretary of the Interior, or otherwise, thereafter so locate, might avail themselves of the provisions of the act.

The act of 1875 was more circumscribed. It did not apply to Indians generally but to those of special qualifications, those who had separated themselves from their tribes and the influence of their tribes, who had advanced, therefore, to a higher status and were better prepared to manage their affairs than Indians in general. And it might well have been considered that a five-year restriction upon the alienation of their titles, added to their five years' residence, would give them an appreciation of values sufficient to protect them against the improvidence of their race and the imposition of others.

Therefore, the acts had no repugnancy but had different fields of application, and this, it might be contended, even considering their future operation. Of this, however, we need not express opinion. The act of 1884 applied to Indians then located on the public lands. Regarding Taylor simply as an Indian those words might be considered to be applicable to him; regarding the purpose of the act, which was to confer a benefit, not confirm one, they did not apply to him or to Indians in his situation, for he, and Indians such as he, were the beneficiaries of the prior act and he and other Indians, it may be,—but certainly he—had substantially performed its conditions. What remained to be done, and could have been done before the act of 1884 was passed, was not much more than ceremony.

Nor does the fact that the act of 1884 applied to such Indians as might then be *located upon the public lands* broaden it so as to include Indians who were proceeding under the act of 1875. The rule is established that under acts of Congress concerning the public lands those are not

regarded as such to which a claim has attached, though Congress may, if it be so advised, exercise control over them. *Hastings & Dakota Ry.* v. *Whitney*, 132 U. S. 357, 361, 364; *Hodges* v. *Colcord*, 193 U. S. 192, 196; *Bunker Hill Co.* v. *United States*, 226 U. S. 548, 550. Homestead entries under the act of 1875 cannot, therefore, be considered as having been referred to.

Taylor and those in like situation did not need the aid of the act of 1884. Its language was not of confirmation of rights but was permissive and prospective and related to the initiation and acquisition of rights by a different class. And having this definite purpose, it would be difficult to suppose that, besides, rights acquired under prior laws were intended to be limited without reference to such laws. This view makes it unnecessary to inquire whether Taylor's rights had progressed beyond the point of subjection to the power of Congress, he having, as we have said, completed his residence upon the land, and nothing remaining but to make final proof and receive the assurance of his title, which, we have seen, was his situation nearly a year before the passage of the act of 1884.

Congress has undoubtedly by its legislation indicated a policy to protect Indians against a hasty and improvident alienation of their lands, and the Government has cited a number of statutes. But, as we have pointed out, such policy was satisfied by the act of 1875 and we do not think there is anything in the history of the act of 1884 which sustains the contention that it was intended to be an amendment of the act of 1875 or to indicate that the latter act was not sufficiently potent for the purposes of protection. The recommendation of the Interior Department was for the remission of fees and this was responded to, but confined as we have indicated; and the Interior Department considered it to be so confined, for fees were exacted from Taylor upon his final proof, manifesting

opinion, within a few months after the passage of the act of 1884, that it did not apply to him.

Decree affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

UNITED STATES *v.* HEMMER.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 86. Submitted May 5, 1916.—Decided June 5, 1916.

Where there are no repealing words in a later act, a former act relating to the same or a similar subject is repealed only by implication; and repeal by implication is not favored.

Section 15 of the act of March 3, 1875, c. 131, 18 Stat. 402, permitting Indians under specified conditions to make homestead entries of the public lands, was not repealed or superseded by the Act of July 4, 1884, c. 180, 23 Stat. 96, permitting Indians then located on the public lands to make such entries.

An Indian who made his homestead entry prior to passage of the act of 1884, but who did not make his final proof until thereafter *held* to have made such entry under the act of 1875, and not under the act of 1884, and the period of inalienability was limited to five years under the act of 1875, and not to twenty-five years under the act of 1884.

While Congress has power to, and may if so advised, exercise control over lands to which claims have attached under existing statutes,